No. 3105

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN CENTRAL INSURANCE COMPANY, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, INSURANCE COMPANY OF NORTH AMERICA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG, PA., SECURITY INSURANCE COMPANY OF NEW HAVEN,

Appellants,

vs.

DAVID ISAACS,

Appellee.

BRIEF FOR APPELLANTS.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Hon. FRANK H. RUDKIN, Judge pro tem.

JESSE OLNEY,
Solicitor and Counsel for Appellants.

PERNAU-WALSH PRINTING CO.

Table of Contents.

ARGUMENT.

Table of Authorities.

No. 3105

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN CENTRAL INSURANCE COMPANY, NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, INSURANCE COMPANY OF NORTH AMERICA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURG, PA., SECURITY INSURANCE COMPANY OF NEW HAVEN,

Appellants,

vs.

DAVID ISAACS,

Appellee.

BRIEF FOR APPELLANTS.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Hon. FRANK H. RUDKIN, Judge pro tem.

Requesting Reversal and a Just Decree De Novo in This Court.

This cause comes before the Court on appeal from the United States District Court for the Northern District of California, Second Division, having been tried there before Hon. *Frank H. Rudkin*, temporarily sitting

therein; and is a suit in equity by the *cestui que trust,* various fire insurance companies, against their trustee, a salvage man, for a true accounting of a large stock of merchandise placed in his hands for sale for them and which he has entirely disposed of. Instead of referring the cause to the Master the Court itself proceeded to take the account and upon the conclusion of the trial entered its decree dismissing the bill with costs to the defendant. Appeal is now had from this decree together with the reasons upon which it was based as given in the Court's memorandum opinion, and from various rulings of the Court upon the trial in its exclusion and reception of evidence.

The complainants respectfully ask a just decree *de novo* in this Court.

Statement of the Case.

THE PLEADINGS.

Paragraphs I and II (except last six lines) of the first amended bill of complaint are uncontroverted by the answer save as to amount in controversy and remedy; and the facts therein stated are therefore established as follows:

That the complainants are Eastern Fire Insurance Corporations and that the defendant is a resident of San Francisco, in the State of California.

> "That the complainants are and at all the times hereinafter mentioned were fire insurance companies carrying on business individually and through

underwriters in the State of Washington in the United States of America; and on or about the 11th day of August, 1913, were insurers as aforesaid in various proportional amounts of the stock of merchandise of A. Bridge & Co. in the City of Seattle in the said State of Washington. That on or about said date a fire occurred in the said store and merchandise causing a loss. That the assignee for said Bridge and complainants, his insurers, could not agree upon the amount of damage. That the said Bridge stock of merchandise was inventoried at some $48,000 and after negotiations between your complainants and the assignee of said assured the sound value of the said stock of said Bridge remaining after said fire was fixed at $34,300. as a compromise between your complainants and the assignee of said Bridge, and your complainants for the said amount purchased the whole of said stock of merchandise from the assignee of said Bridge, their assured. That the defendant contracted *with your complainants* to dispose of this their said stock of merchandise for them, offering to advance them a guarantee of $18,100 in cash and to take over from them *as their trustee* their said merchandise in its entirety and to sell and dispose of the same for them to the best possible advantage and to return to *them* any and all monies taken in by him for them on such sale over and above his said guarantee and actual expenses. That the *complainants accepted* defendant's said offer and delivered over their said stock of merchandise into his hands to do his best for them on the terms and conditions aforesaid. That the defendant after thus *contracting with the complainants* did actually take over into *his exclusive* and *sole possession* and *control* their said stock of merchandise and as their said trustee and upon the terms and conditions mentioned proceeded to sell the same in the said City of Seattle and State of Washington, and sold all of your complainants' said stock of merchandise therein.''

and the bill then proceeds; the following quotation likewise remaining uncontroverted by the answer:

> "That following said sale and on or about the 26th day of November, 1913, this defendant rendered a statement *to your complainants* of his said operations *as their trustee*, as follows:
> "Statement—Salvage of A. Bridge & Co., Clothing, furnishings, shoes.

Net Sales		$28,901.92
EXPENSE:		
Rent	$ 920.00	
Light	66.88	
Advertising	1204.21	
Clerk Hire	1655.21	
Materials	90.84	
Insurance	34.59	
Commission for handling at 20% on $28,901.92	5780.38	
Advanced as guarantee	18,100.00	
	$27,852.11	27,852.11
	Net Proceeds	$ 1,049.81"

and the bill thereupon proceeds and alleges that the said purported *"net proceeds"* were paid over to the complainants who at the time believed and had no other knowledge nor information of any kind to put them on enquiry to question the said statement or good faith of their trustee; and that the complainants are informed and believe and therefore charge the fact to be that the said statement did not constitute a full accounting by the defendant as their trustee, and that the expense items of said statement *"are excessive and likewise with the totals false and untrue";* and that the complainants ask discovery by the Court of the entire true expenditures and receipts of their sale.

The bill then proceeds to allege a clandestine sale in bulk by the defendant to himself of the complainants said merchandise, in the following words:

> "The complainants further charge and show to your Honors that this defendant, their trustee, sold in bulk secretly to himself without their knowledge or consent the balance of their said stock of merchandise remaining after only three weeks of his said sale for them in the City of Seattle, State of Washington. That knowledge of said sale to himself was not communicated to your complainants at any time by said defendant, and that they only became aware of the same within ten days prior to the commencement of this action. *That said defendant thus sold secretly to himself between one-half and two-thirds of their entire said merchandise, the exact amount of which they are unable to state and ask discovery by this Court.* That said alleged sale to himself was accomplished by only one day's notice to the public by means of a small advertisement in a newspaper which said time and notice were grossly inadequate to obtain competitive bids. That in fact as your complainants are informed and believe and therefore charge the fact to be, that this defendant, their trustee, thus transferred to himself their said trust fund consisting of their said merchandise, without bona fide competitive bids therefor of any kind or nature whatever; and that upon said sale to himself clandestinely of their merchandise he credited himself and withheld from them upon his said final statement and settlement a sum amounting to 20% of his claimed consideration paid therefor, claiming the same unbeknown to them as commissions upon his own purchase. That said defendant was not entitled to said or any commissions upon his said clandestine appropriation of their merchandise, and they ask and pray a return to them of said monies so withheld in such sum as the Court shall find due.
>
> *That said transfer to himself by their trustee was a gross fraud and imposition upon your com-*

> *plainants* who ask that said transfer be set aside and that their said trustee be charged with the full value of said trust fund together with his profits thereon additional in such sum as the Court shall find due upon the accounting herein prayed, together with legal interest thereon from time of said sale."

The bill then proceeds to show that the complainants had no knowledge of any of the said facts charged in said bill until after the conclusion of a case in the United States District Court for the Northern District of California, Second Division, brought by the defendant's partner against this same defendant to establish a partnership in a portion of the same merchandise which is the subject of this action, wherein the defendant's partner testified the defendant on his sale for the complainants had taken in sums largely in excess of $28,901.92 claimed by him in his said statement to the complainants to have been the total gross proceeds of their merchandise; and that the fact of such testimony and the facts themselves had not come to the complainants' knowledge until a few days prior to their bringing of the present action to force their trustee to disclose in detail his operation and handling of their trust fund. That the defendant was trusted by them and they believed his representations in his said statement to them and did not discover its falsity until and in the way mentioned; and that they were misled by his said false representations and in ignorance of their falsity accepted as true and made to them in good faith the said misrepresentations of facts contained in his said statement to them,

> "That thereafter the fact of the falsity of the said statement rendered them by their said trustee and the fact of the existence of monies so withheld by him from them has been *sedulously* and *fraudulently concealed* by him, said defendant, to the present time",

and ask discovery by the Court of the amount of excess monies received by their trustee over those acknowledged and a full accounting.

The bill thereupon sets out the complainants' demand upon the defendant for such accounting and his curt refusal; and that they have therefore been forced to bring this suit in equity through his own act; and that they have thus been compelled to employ and become indebted to counsel in this litigation.

The answer alleges that the complainants had knowledge of all the frauds perpretrated upon them by the defendant as their trustee at the time they received from him the statement and purported "net proceeds" set forth above and contained in Paragraph III of the bill; and that his said statement and figures therein are true and correct; and that the complainants have been guilty of laches.

As to the clandestine sale in bulk of the complainants' merchandise by the defendant as their trustee to himself and his commissions thereon, the answer sets up the defense of the Statute of Limitations, Stated Account, and Laches.

The Facts.

Preliminary.

The facts in evidence resolve themselves largely upon the record around three separate individual inventories taken at different times in themselves mutely displaying the history and value of the complainants' merchandise constituting their trust fund in the hands and exclusive control of the defendant as their trustee: these are the

First Inventory dated August 18, 1913 (Complainants' Exhibit C) taken immediately after the so-called "fire" of the goods on hand, at the original *wholesale* cost price of the merchandise to Mr. Bridge, amounting to $45,954.48 constituting the trust fund which came into this trustee's possession and exclusive control; the *retail* value of the merchandise being some $60,000.

Second Inventory dated September 28, 1913 (Complainants' Exhibit 4) taken immediately after the 19 days retail sale by the defendant for the complainants and purporting to show the merchandise on hand at its close at the same cost prices as the First Inventory, in the sum of $24,653.35 Bridge *wholesale* cost prices, and which the defendant admittedly transferred to himself in bulk for $8,875 wholesale.

Third Inventory dated November 17, 1913 (Complainants' Exhibit 9) taken after this trustee's purchase in bulk and after he had conducted a seven weeks' retail sale for himself in his partnership of H. C.

Seynei & Co., called the "Seynei Sale", showing the amount of goods on hand at its close, amounting to $16,633.57.

These three inventories become the three hubs for radiating facts broadly resolving themselves into the following three groups:

The Insurance Retail Sale conducted by the defendant for the complainants to the public and lasting only 19 selling days, the First Inventory being used as the basis for the prices on that sale, the retail prices being marked up automatically and sold at an average of 20% *above* the prices for the same articles given in the First Inventory at wholesale. About *one-third* of the complainants' merchandise was sold.

The Sale in Bulk of the remaining *two-thirds* of their merchandise conducted by the defendant clandestinely to himself for which, for the purposes of his own percentage "bid", he made up the Second Inventory, claiming it to have been taken on the same basis as the First Inventory, i. e. at the original wholesale Bridge cost prices. In fact it was not taken at those cost prices but was depreciated by this trustee some $6500 or more for his own individual gain.

This Trustee's Personal Profits through dishonest manipulation of the trust fund consisting of the complainants' merchandise through concealment of the actual returns of their 19 days retail sale; his depreciation of the Second Inventory; his clan-

destine sale of some $31,000 of the complainants' merchandise to himself for $8875; his personal profits thereafter upon this purchase as shown by its sale at retail to the public during his partnership, the Seynei Sale; and the Third Inventory taken at its close on the same basis as the First Inventory; to say nothing of $2218 withheld by him unknown to the complainants as commissions on his own secret sale to himself of their merchandise in bulk.

THE EVIDENCE FOR THE COMPLAINANTS.

The small fire loss and its strange adjustment.

The stock consisted of men's clothing, furnishings, hats, caps, shoes and rubber goods. The evidence shows there was actually but little damage, that the fire was over in twenty minutes, and did not extend over six feet of floor space, the damage being confined to goods on one or two tables which was some $500, and that after the fire over *ninety* (90%) per cent of the merchandise was good and undamaged; all showing clearly how these complainants were mulcted upon that loss.

The complainants called in an independent adjuster in Seattle, one George C. Main, who was not in their regular employ nor a salaried employee, to represent them on the adjustment of the loss. Mr. Bridge, the owner of the store, assigned his stock of merchandise to a representative of a Seattle bank to secure the bank for some $15,000 advanced to him to discount for cash his bills for this same merchandise. His assignee employed one J. R. Mason as adjuster for the bank upon

the loss. An inventory was then taken by Mason called in this cause "The First Inventory" (Complts. Ex. C) showing the original wholesale cost price of the entire stock of merchandise to Bridge, the owner, this inventory aggregating $45,954.00; which total did not include the freight and discounts which, if added, Mr. Bridge testified would have made the original wholesale cost price to him over $50,000, and that even *after the fire* its *retail* selling value was in excess of that sum. This inventory included all the merchandise upon the premises, even the badly damaged, and upon the trial was agreed to be correct by all the parties to the cause and the trial Court also so held in its opinion.

Main could not agree with Mason upon the amount of the loss and refused absolutely to pay the amount claimed, taking the other tack of getting the value of the stock down as low as possible with the idea of the complainants buying it in bulk at wholesale and selling it out at retail at a good profit; the final arrangement being thus a compromise of figures only.

Mr. Bridge was not the owner of the building where his business was located but held a lease at a monthly rental of $920. For the reason that another such monthly payment was about to fall due which would be saved by an immediate adjustment of the loss, and because the creditors of Bridge were pressing for their money, Mason, acting for them, and as a quick compromise after short negotiation sold to the complainants for $34,300 cash this entire Bridge stock, although he testifies he personally, if he had been allowed to use his own judgment, would never have sold it at that figure,

as the stock at retail should have sold at and above the First Inventory cost prices.

Thus the adjustment of the loss consisted of the buying of the stock from the assured and turning it over to Isaacs—all one transaction. It was part of Isaacs' money that bought the stock; he put up a guarantee of $18,100, and these companies the balance to make up the $34,300 paid, the whole thus forming one complete proceeding.

Defendant takes over the stock into his exclusive and sole possession and control.

At the same time the complainants arranged with the defendant to dispose of the stock for them, he advancing this guarantee of $18,100 and taking over from them as their trustee their said merchandise in its entirety, to sell it to the best possible advantage, and to return to them all monies taken in by him for them on such sale over and above his said guarantee and actual expenses. This offer was accepted by the complainants as they expected to eliminate their loss, otherwise there would have been no object in their purchasing the stock, as an estimated loss is not a complete loss for the merchandise can be reconditioned and sold and the actual loss cut down sometimes 50% and more. The defendant thereupon accepted from Main the keys of the Bridge store and took over from Main the complainants' merchandise "*into his own exclusive and sole possession and control*". Main handed the entire stock over to Isaacs, said he had nothing more to do with it, that it was entirely in Isaacs' hands, that he could do as he pleased, and turned the keys over to the defendant.

His mishandling of this trust fund.

The record shows this trustee's handling of the trust fund thereafter was as follows:

Isaacs opened a sale for the complainants of their merchandise at the same location and in the same store where the fire occurred and conducted a retail "fire sale" there to the public for a period of nineteen (19) selling days from September 5 to September 28, 1913.

This trustee claimed to have taken in only $17,800 for the complainants on their retail sale. These receipts were *gross,* with an *expense for those 19 days of $7531.00*

These purported gross receipts *retail* of $17,800 are 20% *below* the original Bridge *wholesale* cost prices of the merchandise as given in the first inventory. The complainants attacked their trustee's statement to them, by placing on the stand five of Isaacs own salesmen on his retail sale of their merchandise, who were in charge of as many departments on that sale. These witnesses testified that the merchandise was marked and sold at *retail* by Isaacs at prices averaging 20% *above* the *wholesale* cost prices given in the first inventory for the same articles. Two other witnesses, Mr. Bridge, the former owner of the stock, and Mr. Bailey, also together with two of the salesmen, testified to admissions made by Isaacs *before the 19 days retail sale of the complainants closed* that he had *then, already* taken in his guarantee ($18,100) his commissions ($3560.00) and expenses ($3971), and "was on velvet" right then. The defendant however *now* says he took in gross only

$17,800 which is less than his guarantee of $18,100. The defendant did not place a single one of his salesmen on the stand to contradict these seven witnesses, nor impeach them in any way.

The auditor of the Seattle National Bank testified that between the dates of the sale this trustee deposited $20,744.26, while claiming to have taken in on the sale only $17,800.

The manager of an obscure private banking firm testified that on the day Isaacs opened the sale for the complainants he hired a safe deposit box of them, and visited it on an average of three times a week during the complainants' sale; and this trustee himself on the stand admitted he put money from the complainants' merchandise in that box.

There was much other evidence in detail attacking this trustee's figures which I shall refer to more at length at later pages.

Isaacs forms hidden partnership to secretly own trust fund.

Only *four* (4) days after opening up this sale for the complainants as their trustee, on September 10, 1913, as established by the interlocutory decree by Judge Van Fleet (*Seynei v. Isaacs,* U. S. District Court, Northern District of California, Second Division, In Equity, No. 83), Isaacs formed a secret partnership with Bridge's manager, H. C. Seynei, for the purpose of handling and getting possession of the complainants' stock, this same merchandise, for themselves, in which partnership the defendant was not to be known

as a partner to the public nor to Mr. Main nor to these complainants. The name of this secret partnership was H. C. Seynei & Co., but to avoid the least suspicion the defendant directed that the later business be run under simply the name "Harry Seynei".

He transfers trust fund to himself through a dummy.

For the purpose of getting possession of the stock as actual owner, Isaacs closed down the fire sale Saturday, September 27, 1913, and placed the following small advertisement in the Seattle Times next day, Sunday (Complts. Ex. 17) in the want ad column:

> "The balance of the A. Bridge & Co. stock, 103-05 First Ave., Seattle, will be offered for bids Monday, Sept. 29, at 3 p. m. Coast Fire & Marine Insurance Co., D. Isaacs, Manager."

Isaacs then consumed Sunday in taking a depreciated inventory of the balance remaining of the complainants' stock, claiming it to be $24,653 at Bridge cost prices (though in fact it was some $31,150 or more) as a basis for his own percentage so-called "bid", and on Monday *morning,* at *eleven* o'clock, instead of three o'clock in the afternoon, he walked out in the store and said glibly "well, boys, the stock's sold to Harry Seynei". The evidence was that there were no bona fide bids or bidders at that sale and that the sale was fake. Both Mr. Seynei and Mr. Jeremy testified they saw no bids or bidders. Isaacs claimed to have paid these companies 45% on his inventory, this second inventory depreciated for the purpose of his own bid, at $24,653, or $11,094, from which amount he withheld from these com-

plainants 20% commissions, or $2218, for selling their merchandise secretly to himself without their knowledge; making the actual cash paid by Isaacs only $8875, or roughly *one-third* the inventoried cost of the merchandise by the defendant's own depreciated inventory.

He lowers his own bid and makes $492.

The evidence shows that Mr. Seynei personally never put in a bid nor offered a bid but that Isaacs prepared one for him at 47% (*a carbon copy of which is in evidence; Complts. Ex. 2) and when he found things were going smoothly dropped it down to 45%, thus directly depriving these complainants to the benefit of their trustee of the sum of $492, as they were entitled to the best price he could get for their property.

He eliminates competitive bids.

Mr. Seynei testified that he never paid a cent of the money; that he was not in reality the purchaser; but that he was used as a dummy by the defendant for the purpose of Isaacs acquiring secretly the complainants' merchandise without their knowledge as its owners. Isaacs asked him to speak to his friends not to interfere so Isaacs could get the stock, with the result that there were no bona fide competitive bids.

He admits in writing the stock sold to himself to be worth at wholesale three times what he paid for it.

That same Monday evening Isaacs and Mr. Seynei sat down together at the Hotel Herald in Seattle and the defendant wrote down in his own handwriting the merchandise amounts in the various departments

* Herein p. 165.

to open up business for their secret partnership, footing up the merchandise at $24,603.39, together with instructions to his partner Seynei as to what to do (Complts. Ex. 16*) and said "that merchandise is worth one hundred cents on the dollar".

The following day Isaacs opened up the books of their partnership of H. C. Seynei & Co. (Complts. Exs. 5-6-7), and credited himself with a payment of $11,094 to these complainants, and debited the firm with $24,653 worth of merchandise, and compelled Mr. Seynei, as the resident partner, to do business on that basis.

These entries appear as follows:

In the Ledger, Complainants' Exhibit 7, at pages 4, 6, 7, 8, 10, 12, 13, 14, 16.

His immediate personal profits.

The proof thus shows that the defendant as trustee thus made a neat personal profit of $2218 against his firm, and of $2218 secret commissions against these complainants, or $4436 in all before he sold a single article at retail; his profits by sales of the articles themselves will later appear in detail.

He depreciates the second inventory for his personal gain.

Isaacs' methods of thus depreciating the inventory on his secret sale in bulk to himself was explained in detail by H. C. Seynei and John Jeremy (Tr. pp. 53-54-56-57-78) who were present at its taking under Isaacs' instructions, and whose testimony is corroborated by the testimony and exhibit (Complts. Ex. 19) of Klink, Bean & Co., as follows: that upon the taking of this

* Herein p. 166.

second inventory, under Isaacs' directions some of the best merchandise was laid away in the balcony and the remainder of the stock was made to look as cheap as possible; the clothing was tied up in bundles with old string; the high-priced goods were mixed with the low-priced and bunched in lots; and the *high-priced goods* were *entered in this inventory at prices far below the original Bridge cost prices* as written on the sales tags.

The second inventory in evidence (Complts. Ex. 4) corroborates this testimony that the complainants' merchandise was entered therein by their trustee *in lots* and was not taken piece by piece as in the first inventory, undisputed as being fairly taken at Bridge cost prices, and which included all the merchandise on the premises.

Mr. Seynei testified that $24,653 did not represent the true and correct cost of the merchandise, and that this second inventory made by the defendant did not therefore represent and *was not taken* at Bridge cost prices. The proof also shows that Mr. Main had no knowledge of this depreciation as he states repeatedly he understood perfectly this second inventory was taken at Bridge cost prices (Tr. p. 122) that there was no depreciation on account of damage, and that it was taken on the same basis as the first inventory.

The mute evidence of the inventories themselves shows he lowered the prices in the second inventory for his own percentage bid.

The second inventory was taken for the purpose of Isaacs' own percentage bid. Its depreciation as sworn to by both Mr. Seynei and Mr. Jeremy was corroborated

and established by the evidence of Messrs. Klink, Bean & Co. chartered public accountants, produced upon the trial by the complainants, and the Complainants' Exhibits 18 and 19. The latter reproduced herein*, comparing departments of merchandise in the first inventory (Plffs. Ex. C) with similar departments in this second inventory (Plffs. Ex. 4) exposes the fact that after conducting a three weeks sale *there were more articles of a similar kind at a given price in the second inventory* than in the first; *for the stock remained the same without the addition of new goods.*

For instance: In the first inventory there were 152 pairs of pants costing $2.50 each. In the second inventory taken after a sale of three weeks, there were 354 pairs of pants costing $2.50 each; in other words, there were 202 more pants at $2.50 on hand after the sale than there were at its beginning. This exhibit showed prices were altered and must have been lowered, as an expert buying merchandise *would not raise prices on himself;* and in addition the *high-priced pants* in the second inventory are mostly missing.

Another instance: In the first inventory there were two mackinaw coats costing $3.25. In the second inventory there were 21 mackinaw coats costing $3.25, or in other words, *there were nineteen more* mackinaw coats at $3.25 on hand after a sale of three weeks than at its beginning.

The first inventory shows that $3.25 represented the *lowest price* mackinaw coat in the store; so that the price on the nineteen excess coats must have been low-

* Herein p. 172.

ered from the higher-priced ones (*for there was nothing from which they could have been raised*).

This exhibit and Mr. Klink's testimony showed that these excesses occur continually throughout the departments.

The defendant in no wise contradicted the fact that this second inventory taken by him for the purpose of buying in the stock and on which he placed his percentage bid *did not represent* the Bridge cost prices as he claimed, but was greatly depreciated by him, whereby he cheated these complainants out of thousands of dollars.

The amount of his depreciation of the second inventory.

Mr. Klink testified that upon the basis shown by the testimony of five of the defendant's own salesmen upon the insurance retail sale, that upon that sale by Isaacs the stock was marked and brought a 20% average above Bridge cost prices, the depreciation of this second inventory by the defendant amounted to $6500.

He conceals from complainants his clandestine acquirement of their property.

Mr. Seynei testified that this partnership of H. C. Seynei & Co. was never known to the public, nor was it known that Isaacs had any interest in the stock, but the business was run and advertised under the name "Harry Seynei"; the newspaper advertisements beginning with the picture of Mr. Seynei and ending with statements over his name. These advertisements are

in evidence (Complts. Exs. 11-13-14-15) together with the originals before the Court, and were placed in the paper and the business so run by Isaacs' express direction, and Isaacs said to him: "he didn't want the companies nor Main to know he was the owner of the stock".

After this sale in bulk by Isaacs to himself and then by himself to his firm of H. C. Seynei & Co., a sale for the benefit of that firm was opened right up at the same location, in the same store, at the same rental, with the same merchandise, with the addition at the start of a few hundred dollars of fresh goods. The sale was conducted for *seven weeks* right along under the same conditions as the previous three weeks retail sale for these complainants, with small purchases of new goods from time to time to fill in, aggregating in all less than $6000, which new goods were marked at a profit of 33⅓% above cost.

His padded expense account.

Under practically the same conditions, this trustee's books of his partnership of H. C. Seynei & Co., and their summary by Klink, Bean & Co. (Complts. Ex. 18) show that it cost him only $3133.00 to do business for himself for the full *seven* weeks, while his statement set forth in the complaint (Tr. p. 5) shows it cost him for *three weeks* $3973.60 to do business for them. In other words he did business for himself at $877 less per week than he did business for his principals.

His further profits.

The defendant's partnership books of H. C. Seynei & Co. and their summary by Klink, Bean & Co. (Complts. Ex. 18) show that this Bridge merchandise alone on this partnership sale for Isaacs' firm brought 10% or $1262.40 above its Bridge inventory cost. After this Seynei sale closed the remaining stock was inventoried at $16,633.57 (Complts. Ex. 9) original cost prices and was sent to San Francisco and was sold there. Judge Van Fleet placed the value of this portion of the stock at inventory prices of $16,633.57.

The total receipts for the entire Bridge stock purchased by this trustee in bulk were $15,466 more than he paid these complainants for it.

He makes no denial of his frauds.

Upon the trial the foregoing facts remained substantially uncontroverted by the defendant, including his depreciation of the second inventory *(upon which subject he remains stone dumb)* but asserts he told George C. Main the independent adjuster on the original loss, about the sale in bulk, and therefore is immune from attack claiming Main to have been a general agent of these complainants, and that his alleged communication of the facts to him was communication to them, though apparently not until after the final statement rendered by Isaacs to the complainants. The defendant produced no proof of Main's agency, nor offered nor introduced in evidence any testimony showing Main had knowledge of his frauds nor the depreciation of the

second inventory nor of the fact that it was *not* taken at the original Bridge cost prices.

Main rendered his bill September 8, 1913 (Tr. p. 235), to the complainants for his services on this loss, and was paid. The record shows no further authority or further charges or payments thereafter. Main himself claimed no further authority or instructions than those of an adjuster on the original loss, and said he turned the merchandise over to Isaacs and had nothing more to do with it. Isaacs was the complainants' agent, not Main. Isaacs arranged the sale in bulk while Main was out of town, and Main says his only knowledge of it was hearsay, and that he did not examine the stock at that time nor any reports or records of Isaacs at any time; and that Isaacs' sales slips were not sent to him as a daily report; he never saw them, nor had anything to do with them, nor had any knowledge of them, but that Isaacs used to come up and use the adding machine in Main's office for his own purposes.

Isaacs deceives the complainants by his tricky statement in which he makes no mention that he has become the owner of their merchandise or that he has lumped the stock off to himself in bulk.

After the defendant's seven weeks' partnership sale, the Seynei sale, the remainder of the stock was inventoried in the third inventory amounting to $16,633, (Complainants' Exhibit 9), and was brought by Isaacs to San Francisco, from which city he sent to Seattle to be mailed from there back to San Francisco again (Tr. p. 5) to the complainants here (a peculiarly *Isaacian* method) the following brief statement of ten lines covering his entire handling of the trust fund:

"Statement—Salvage of A. Bridge & Co.

Clothing, furnishings, shoes.		
Net Sales		$28,901.92
Expense:		
Rent	$920.00	
Light	66.88	
Advertising	1,204.00	
Clerk hire	1,655.21	
Materials	90.84	
Insurance	34.59	
Commission for handling 20% on $28,901.92	5,780.38	
Advanced as guarantee	18,100.00	
	$27,852.11	27,852.11
Net proceeds		$1,049.81"

The foregoing statement to the complainants gave them no information of the sale in bulk to himself as their trustee nor his secret commissions on his own clandestine purchase nor information that his sale in bulk to himself was on a false and depreciated inventory prepared by him for the occasion. The five Pacific Coast managers of the complainants testified they had no knowledge of any of these matters nor of any matters not contained in the statement, which regular on its face was accepted in the due and regular course of business.

Upon the trial the defendant claimed that because he thus sent the foregoing statement to Seattle to his friend Main, there to be forwarded through him to the companies here, that such roundabout procedure estops them from enquiring into matters not appearing upon the face of his statement and thus deliberately concealed from these complainants by him.

His gross inadequacy of consideration on his own purchase.

For merchandise inventoried at $45,954, complainants received only $19,194 from this trustee.

The evidence shows that the complainants paid $34,300 for the original stock which was inventoried at cost price at $45,954 and which inventory included all the merchandise at its original cost; that is, they paid cash 75% of its original cost, as against their trustee's payment to them of 35% (his bid being 45%, on which he withheld 20% commission, making 35% net). This trustee thus clandestinely transferred to himself about two-thirds of the same merchandise for 40% less than the *cestui que trust* had paid cash for it four weeks before.

He denies his own partnership with Mr. Seynei.

After using Seynei as dummy throughout these proceedings and making him believe he was a partner, the defendant then, after reaching San Francisco, refused, as in the case at bar, to give his fiduciary an accounting, and Mr. Seynei came down to San Francisco, and began an action in the U. S. District Court for the Northern District of California, Second Division, numbered in equity eighty-three, to enforce his partnership and for an accounting, which after some ten days in Court and before the Master was settled by the defendant after decision by Judge Van Fleet but before formal entry of judgment.

Judge Van Fleet's decision puts the complainants on enquiry.

On the trial of this Seynei suit Mr. Seynei testified that the sums stated to the complainants by this

defendant to have been all he received, were grossly inadequate and that Isaacs had received other sums far in excess of the amounts he had represented to the companies as having been all he had taken in. These statements made by the defendant's partner under oath coming to the attention of the complainants, together with the formal decision* of Judge Van Fleet roundly scoring the defendant as a swindler, they at once demanded a full and detailed accounting of the defendant as their trustee, which he refused.

Isaacs curtly refuses them an accounting.

Mr. Sandford H. Horne testified that he was present when specific demand was made by the complainants upon the defendant for an accounting and of his curt refusal "they'll get no accounting from me". There was no attempt at contradiction by the defendant.

The present equity suit was thereupon filed seeking from this trustee a full and true accounting from him of the trust fund which he has entirely disposed of.

The complainants urged upon the trial that their trustee should be at least charged with the amount of the first inventory, showing the merchandise which came into his hands.

* Herein pp. 139, 140, 141.

THE EVIDENCE FOR THE DEFENDANT.

His Attempt at Justification.

Introduces "report" of a hired accountant as to his honesty and integrity.

This trustee in support of the allegations of his answer and his statement and figures rendered the complainants as set forth in the bill, went upon the stand and testified in his own behalf that these figures were correct, and introduced over complainants' objections another statement or so-called "report" by Lester Herrick, an accountant in the employ of one of defendant's counsel, to the same effect, and letter perfect in even certifying to Isaacs' own honesty and integrity; this "report" being based upon self-serving data furnished Herrick by the defendant weeks before the trial and without reference, as Herrick himself testified, to the facts and evidence produced by the complainants upon the trial, and which Herrick says were not taken into consideration by him. This data was some loose-leaf sales slips without the production of anything therewith by which their accuracy could be checked, and claimed copies of original receipts and other documents, no originals being produced or their absence accounted for, and a small lone "record book", containing a few entries in pencil of the proceeds of this $60,000 trust fund, the balance of the book being taken up with like entries of other business enterprises extraneous to the case; this "record" book being the only book of account (if it may be called such) produced by the defendant upon the accounting and of which Herrick said it was not a complete record.

Withholds from the Court all evidence by which the integrity of his self-serving data could be ascertained and checked up.

The defendant thus produced in evidence some 10,000 loose-leaf sales slips purporting to be all the sales slips from this retail sale, footing up approximately the amount he claimed to have received for these complainants, but withheld or did not produce their salesmen's indexes, adding machine totals and cash register totals and original merchandise sales tags, by which alone the accuracy of the sales slips produced could be checked and determined, and which, as his witness Herrick testified, constituted the chief audit and check by which their correctness could be ascertained and which are customarily preserved in every well regulated institution and without which he had no way of determining if all were there. No evidence or explanation was vouchsafed by the defendant for their nonproduction, although his own witnesses testified and Isaacs himself that these had been obtainable and were used upon the sale.

Herrick testified he did not check up the individual sales slips as there was nothing to check them up with, and that some might be missing. The record also discloses that the entries in the "cash book" did not include money taken out or not put in the cash drawer during the day and that neither the cash book nor the sales slips were a complete record.

His own daughter knew nothing of his "cash book".

Isaacs' own daughter, Mrs. Cohn, the only other witness besides Herrick and himself, said she helped

during the complainants' sale, but did not compare the daily totals of the sales slips with the cash entries at the time and so did not know whether they corresponded or not.

He gives himself "the lie direct"—testifies his own sales slips are short.

Regarding these sales slips Isaacs himself testified that he did not instruct his witness Herrick, the expert accountant, to tally up the articles on these sales slips with the first and second inventories, whose differences would show the number of articles actually sold, but that *he did that himself;* but even by *doing it himself,* the figures themselves, which he gave the Court as the totals of these slips, proved these sales slips to be incorrect in that they showed he had sold less articles than he should account for, and that therefore these sales slips produced were not all and that many had been withheld from the Court, or else those produced proved conclusively his depreciation of the second inventory preparatory to his clandestine transfer of the stock in bulk to himself.

For instance, Isaacs testified the sales slips produced by him showed in comparison with the differences between the first inventory taken immediately *before* his sale at retail for the complainants and his second inventory taken immediately after closing down that retail sale, (the difference between them representing the number of articles sold by him on the retail sale) that "the pants show that there are 64 pair short of what I received"; also that there was a

shortage in the shirts, underwear, socks, handkerchiefs, mufflers, gloves, mittens.

Isaacs' own statements on the stand show that in computing the number of articles which were sold under seven separate headings (such as suits and pants) from the sales slips they fell short in five of those instances out of the seven, and that in these few instances alone *over five hundred articles are missing and unaccounted for.* These instances represent only a small part of the entire merchandise that was sold, and also only a small part of the articles missing.

In reality the sales slips produced by the defendant show sixteen hundred and twenty-five (1625) *articles missing and unaccounted for, being one-twelfth* (1/12) *of the total number of articles sold.*

His labor account sophisticated and his own testimony contradictory.

This trustee testified as to his expense account of the retail sale that his labor for the first week was $270, or $1655 for the entire three weeks; which would make the labor average for the second and third weeks over $600. Thus he testified to increasing his labor *threefold,* at the same time saying that the sales fell off to such an extent that he was obliged to close the retail sale and buy the stock himself.

He fails to explain his bank deposits.

This trustee also testified to having commingled the trust funds of the complainants with his own personal

funds in the Seattle National Bank, and in order to explain his total of $20,744 bank deposits during the complainants' sale while claiming to have taken in only $17,800 (and to have deposited of this only $15,978.72) produced four checks from a sale he was conducting coincidentally at North Yakima in the State of Washington aggregating $2850.00, claiming this amount having been sent down to him at Seattle from his manager at North Yakima and having been deposited in the Seattle National Bank.

THE REBUTTAL EVIDENCE FOR THE COMPLAINANTS.

Isaacs' sister-in-law swears she sent him at Seattle from North Yakima $7000 in checks, instead of only the $2850 testified to by him.

The complainants then in rebuttal placed on the stand the defendant's own sister-in-law, Mrs. Benzoin, who testified she managed the sale for him at North Yakima, and that during the insurance retail sale by him for the complainants she sent down to Isaacs at Seattle some $7000 in checks instead of only $2850, as testified to by the defendant; which showed either that the defendant had another bank account or used his safe deposit box to keep secret the moneys withheld by him from the complainants.

Mr. De Lappe of the American Central Insurance Company testified that Isaacs never had any interview with him in connection with any matters relating to those in litigation.

The complainants directly impeach the defendant's sales slips.

The complainants directly impeach their trustee's unchecked sales slips and accountant's "report" and his self-serving figures and statements, showing he disposed of their merchandise at 20% *below* the original Bridge inventory cost prices (Plffs. Ex. C), that is that he sold for $17,800 stock inventoried at $21,301 cost prices, by the evidence of five of the defendant's own salesmen on his retail sale for the complainants, as follows:

Mr. Seynei, who managed the sale for Isaacs; Mr. Jeremy, who as an employee of the defendant had charge of the clothing department; Mr. Basher, who as an employee of the defendant was in the shoe department; Mr. Johnson, who as an employee of the defendant was in the clothing department; and Mr. Meyer, who as an employee of the defendant had charge of the furnishings; all of whom were so employed during Isaacs' entire retail sale for the complainants and who testified that upon that retail sale the stock sold at an average of about 20% *above* the original Bridge inventory cost prices (Plffs. Ex. C), and that that retail sale was a great success.

The defendant produced not a single salesman to controvert this testimony except his own unsupported word.

In addition the complainants called Mr. Bridge, the original owner of the stock and store, who testified to Isaacs' statements to him to having taken in his entire guarantee, expenses and commissions, *before*

the close of the sale at retail for the complainants; and as to how the merchandise itself was marked and sold above cost from the witness's own personal observation; also the testimony of Mr. Jeremy as to the defendant's statement made openly to himself and others *before* the retail sale closed down that he was "on velvet" right then; and the testimony of Mr. Seynei that before the retail sale closed Isaacs had stated it was a great success, that it had gone way beyond his expectations; and that he had taken in his entire guarantee and expenses, and was on velvet; that he would now get the balance of the stock and make plenty of money.

In addition also the testimony of Mr. Bailey who particularly described Isaacs' admissions to him personally to the same effect during the progress of that retail sale for the complainants, that he had then already taken in *before that retail sale closed and before the sale in bulk to himself* his entire guarantee, commissions and expenses and was on velvet right then; and to the fact of the sale being a highly successful sale and the biggest at that time Seattle had known, and of the conditions and crowds surrounding it.

In addition also the complainants introduced in evidence some of the actual sales *tags* themselves (Complts. Ex. 1) of Isaacs' sale for them, showing the prices at which some of their merchandise actually sold above the Bridge cost prices, and thus corroborating the five salesmen against the defendant's unsupported word.

And in addition the testimony of Mr. Seynei and Mr. Jeremy as merchandise men and Mason and Main as adjusters, that as a fire is a big drawing card, a fire sale increases the value of a retail stock of merchandise over an ordinary sale anywhere from 25% to 50%, thus corroborating the salesmen as to the merchandise having been marked and sold by the defendant *above* the original cost prices in the first inventory.

Also in addition the complainants further impeached the defendant's sales slips by introducing in evidence the books of Isaacs' firm of H. C. Seynei & Co. (Complts. Exs. 5-6-7) and the summary of the same by Klink, Bean & Co. chartered public accountants (Complts. Ex. 18), showing that the "fag end" of this same stock, after the three weeks' insurance sale of the best of it, even brought 10% *above* the original Bridge inventory cost prices as shown by the first inventory (Plffs. Ex. C), upon the sale for his firm after his transfer to himself of the stock in bulk.

The articles missing and unaccounted for impeach the sales slips.

Further the defendant impeached his own sales slips by testifying that the articles sold as designated by these sales slips *fell short* of the actual number sold as determined by the difference between the first and second inventories.

This trustee also impeached the selection of sales slips offered the Court through his failure to produce

and offer in evidence with them their salesmen's indexes, their adding machine, and their cash register totals by which alone their accuracy could be checked and their integrity determined. He offered no excuse for their non-production though the evidence showed they were made and used upon the complainants' retail sale.

And Mr. Jeremy in his testimony showed how the salesmen's indexes are a check on the cashier or manager as well as on the salesmen, and testified how a dishonest manager or trustee could destroy any number of sales slips and how without their salesmen's indexes there could be no discovery.

The sales slips produced *impeach themselves*—as many of them bear other dates than those of the complainants' sale, and many are undated.

THE DECISION OF THE TRIAL COURT.

The District Court held that the defendant had fully accounted in every way upon the trial; that the burden of proof rested upon the complainants rather than upon their trustee, even though he had benefited personally by his handling of the trust fund; that the complainants had failed to sustain this burden of proof; that the complainants had not impeached defendant's sales slips; that the said account rendered them by their trustee had become an account stated and could not be opened despite the arrant frauds shown;

and that anyway the complainants were bound by the alleged knowledge of George C. Main, an independent adjuster of the frauds of the defendant, though such knowledge by Main was not proved or brought home to him upon the record, and that though no authority to Main to bind the complainants beyond his authority as an adjuster under the Washington statutes had been shown, such authority could be presumed; and that the statute of limitations had run against the complaninants and that they had been guilty of laches; and, upon these assumptions unsupported by the evidence, entered its decree summarily dismissing the complainants out of Court with costs to the defendant.

Specification of Errors Relied On.

I.

Because the District Court erred in its decision in refusing to accept the rule that the strictest interpretation of the law must be invoked against a trustee who has refused to account to his beneficiary and that the most rigid rule of calculation which the law affords should be followed in behalf of the *cestui que trust* as a substitute for such omission.

II.

Because the District Court erred in its decision in holding and concluding every presumption throughout to be in favor of the trustee and against the

cestui que trust, as every presumption should have been held and determined in favor of the latter, the trustee admittedly having derived a personal profit from the transaction.

III.

Because the District Court erred in holding and concluding that the burden was not upon the defendant as the trustee of the complainants to render them a proper accounting.

IV.

Because the District Court erred in its decision in holding and concluding that concealment or unfairness do not necessarily entitle a principal to a judgment avoiding a sale by such agent to himself of the principal's property; and in so deciding the Court disregarded a fundamental rule of equity.

V.

Because the District Court erred in refusing to consider the great preponderance of evidence of a dozen witnesses not parties to the cause against the single self-serving declarations of the trustee testifying for himself.

VI.

Because the District Court erred in its decision in not charging the trustee with the full value of the trust fund in his hands, he having entirely disposed of it and having commingled its proceeds with his

own personal funds and merchandise and kept no separate account of either nor proper books of account.

The Court erred in not requiring him as trustee to return to the complainants the amount of this principal ($45,974) as per the first inventory (Plffs. Ex. C) plus his profits thereon, with interest, less the amount he has already paid.

VII.

Because it was the duty of this defendant Isaacs as trustee for the complainants to have frankly informed his fiduciary of all the circumstances surrounding his secret sale in bulk to himself of their merchandise; and his failure to perform that duty was active concealment and constituted fraud; and the District Court erred in its decision in not so holding and concluding.

VIII.

Because the District Court erred throughout the trial and in its decision in holding and concluding and refusing to consider evidence of actual fraud by the defendant and then in its opinion upon which the final decree dismissing the complaint was entered stating the complainants had not fully and clearly established such fraud.

The Court doubly erred for it was not necessary for the complainants to prove nor for the Court to find expressly that the acts done by this trustee were

done with a fraudulent and wrongful intent; because his acts themselves as disclosed by the evidence were of such a character, considering the fiduciary relationship of the parties, that the law imputes fraud.

IX.

Because the District Court erred in its decision in holding and concluding that the defendant as a trustee commissioned to sell and being himself the purchaser through another (Seynei) secretly of the property of his principals, the complainants, could recover commissions from them on such sale in bulk to himself without their knowledge.

X.

Because this defendant upon such sale in bulk having withheld $2218 from the complainants without their knowledge for secretly selling to himself for $8,875, net, merchandise valued at cost price $31,153, and figured by himself in his own handwriting (Plffs. Ex. 16) at $24,603.39, should have been held to return these commissions to the complainants upon this accounting; and the District Court erred in its decision in not so holding and concluding and charging this trustee upon this accounting.

XI.

Because the evidence shows that Isaacs, this defendant, while trustee for the complainants, sold their merchandise secretly to himself for $8875 net. Within

a few hours afterward he sold the same identical merchandise to his firm of H. C. Seynei & Co for $11,094. This personal profit of $2219 on their merchandise belonged to the complainants and not to Isaacs, their trustee, and the District Court erred in not so holding and concluding in its decision and charging this defendant therewith upon this accounting.

XII.

Because the evidence showed the total net receipts from the entire second inventory of Bridge stock were $15,468 more than Isaacs, their trustee, paid the complainants for it; and the District Court erred in not so holding and concluding in its decision and charging the defendant therewith upon this accounting.

XIII.

Because the District Court in its decision in not considering the mute evidence of the defendant's own figures in his own handwriting (Plffs. Ex. 16) as to the actual value ($24,603) of the merchandise in bulk, this trustee claimed to have sold fairly to himself for $8875 erred in not holding and concluding in its decision the said sale in bulk to himself clandestinely by this defendant to have been for an inadequate consideration, viz., one-third, as shown by the figures of the defendant in his own handwriting and by his admissions to Mr. Seynei regarding those figures; and the District Court erred in not setting aside the said sale in bulk as prayed for by the complainants.

XIV.

Because relative to this secret sale in bulk by Isaacs while trustee to himself, the District Court erred in holding and concluding that this defendant was empowered thus to sell the complainants' merchandise in bulk to himself without their full knowledge of all the facts as his principals; and that he could not be held accountable to the complainants for the personal benefits and profits he derived therefrom.

Because the District Court refused to consider the books of Isaacs firm of H. C. Seynei & Co. in evidence showing that whereas the defendant as trustee for the complainants sold the best of their merchandise on the fire sale for them at a loss of some 20% below their inventoried cost; he sold the remainder, after the secret sale in bulk to himself, the "fag end" for himself at a profit of 10% above their inventoried cost; both being based upon the original Bridge inventory cost as shown by the first inventory (Plffs. Exhibit 'C'), stipulated to be correct by all parties.

XV.

Because as this sale in bulk to himself by this trustee was attended by gross irregularity; and collusively conducted for the benefit of this trustee against the interest of the complainants, and the merchandise sold thereon to himself at a greatly inadequate consideration; the District Court erred in its decision in not so holding and concluding and setting aside the said sale in bulk as prayed for by the complainants and charg-

ing the defendant upon this accounting with the full inventory cost price at least of the complainants' merchandise ($31,153), or at least with the amount of his own depreciated inventory for his sale to himself in bulk ($24,653).

Because the District Court erred further in not charging this trustee in addition upon this accounting with his profits on the complainants' merchandise made by him thereon after his transfer in bulk to himself, as shown by the Seynei books in evidence.

XVI.

Because the District Court erred in its decision in refusing to consider and neglecting to refer to the summary in evidence (Plffs. Exhibit 19) of the chartered public accountants, Klink, Bean & Co., irrefutably showing the raw depreciation of the inventory taken by the defendant for the purposes of his own percentage bid for sale in bulk to himself of the complainants' merchandise; a depreciation of the trust fund in his hands of $6500 for his own personal gain; and the fact that these figures of this exhibit are iron clad in their absolute corroboration of the evidence of Mr. Seynei and Mr. Jeremy of the willful depreciation of the inventory by this trustee, and of his statements made upon its taking.

This one exhibit alone was sufficient to compel the District Court to give judgment for the complainants in a sum at least equal to the total of the depreciated inventory. It proves beyond question the raw

depreciation of this second inventory by this trustee for his own advantage to the detriment of the complainants.

XVII.

Because the District Court erred in its decision in holding and concluding and in its opinion saying:

> "I do not understand the correctness of the second inventory was impugned aside from the claim that the cost price of some of the goods was marked down."

XVIII.

Because the District Court upon this wrong hypothesis above and its conclusions of law thereon erred in holding and concluding in its decision that there was no clear or satisfactory proof by the complainants, and in stating in its opinion that there was some testimony tending to show that the cost price, as disclosed by the second inventory, was cut down materially for the purpose of reducing the amount of the bid but that the Court was not prepared to say that fact had been established.

XIX.

Because the District Court erred in its decision in holding and concluding that

> "the utmost the complainants could claim would be to call upon the defendant to account for the amount of his bid, viz., 45% of the cost price."

XXI.

Because the District Court erred in its decision in holding and concluding that George C. Main, an independent insurance adjuster and not in the regular employ of the complainants, had authority to represent or bind them after his adjustment of the fire loss for them with the assured by their purchase of the stock of merchandise from the assured for $34,300 cash.

XXII.

Because the District Court erred in its decision in holding and concluding that the authority of an adjuster lies in contract. In the State of Washington the authority of an adjuster is purely statutory there and defined by the codes. The complainants conferred no authority on Main except that conferred by the Washington statute which defines the authority of an adjuster within the state.

XXIII.

Because the District Court erred in its decision in holding and concluding that further authority from the complainants to Main must be presumed after his adjustment of the Bridge fire loss for them through their purchase of the stock.

XXIV.

Because the District Court erred in its decision in holding and concluding and saying in its opinion

that the complainants were not represented at all if not by Main.

This is conclusively determined by the pleadings. The first amended bill of complaint, Paragraph II, expressly sets forth that the defendant did "actually take over into *his exclusive and sole possession and control* their said stock of merchandise." There is no denial by the answer nor is the allegation controverted anywhere. Isaacs' contract under the pleadings was with the complainants direct and Main had no authority whatever over the stock in the defendant's hands.

XXV.

Because the District Court erred in its decision in holding and concluding that the defendant rendered his statement to Main.

XXVI.

Because the District Court erred in its decision in holding and concluding that Main was fully cognizant of all the facts relating to the sale in bulk by this defendant to himself as the complainants' trustee.

XXVII.

Because the District Court erred even on the hypothesis of Main's agency in holding and concluding that he had full knowledge of all the matters set forth in the preceding assignment sufficient to bind and estop these complainants from a full recovery in the present cause.

XXVIII.

Because the District Court erred in holding and concluding that an agent (if Main be taken to be one after the adjustment of the loss) could, by his silence, authorize, ratify or sanction an act he could not expressly authorize, sanction or approve; for the reason that Main, upon such hypothesis was an agent, a trustee of an express trust, and he could not permit or authorize Isaacs to do that with the trust estate which he could not do himself; and it was a perversion of the law for the District Court to so hold.

XXIX.

Because the District Court in holding in its decision and concluding that this defendant could claim the benefit of any contractual relation in agency while committing a tort, erred and disregarded one of the fundamental principles of equity.

The defendant is shown by the evidence in the commission of a tort (the lowering of his bid on sale in bulk to himself, his depreciation of the second inventory for the purposes of his percentage bid while trustee against the interest of the *cestui que trust,* his instructions to his salesmen upon its taking, his forming his secret partnership to conceal from his fiduciary his connection with their property and ownership of it, his fake sale in bulk to himself, and his fake auction on the sale in bulk).

XXX.

Because the District Court erred in its decision in holding and concluding

> "the fact that the commission (on the sale in bulk by this trustee to himself) was claimed and held out was known to Main, and through him to the plaintiffs, and no complaint was made by them by reason thereof";

XXXI.

Because the District Court erred in its decision in holding and concluding

> "The defendant commingled trust funds with his own, and failed to keep such accounts as should be demanded of every trustee, but this alone does not prove fraud or mistake,"

and its inference hereon that there was no other proof.

XXXII.

Because the District Court erred in its decision in holding and concluding this trustee's sale slips had not been impeached and that practically all the goods had been accounted for and that the complainants had failed to show their trustee incorrect up to the time of the sale in bulk to himself.

XXXIII.

Because the District Court erred upon the trial and in its decision in its acceptance over complainants' objections of the so-called "report" (Defendant's Exhibit "B"), of the hired expert Herrick, admittedly

made up from selected, self-serving data furnished him *ex parte* by the defendant before the trial and without reference or consideration of the evidence of the complainants as to the facts and based upon insufficient data, upon copies of papers without the absence or destruction of the originals being accounted for, and in the total absence and withholding of evidence such as adding machine totals, cash register totals, and salesmen's indexes, by which alone their accuracy could be established.

The Court's unquestioning acceptance and reception in evidence of this letter-proof report which was a most glaringly imaginative composition as bearing upon the accuracy of defendant's figures and even upon his probity and honesty, was absurd and gross error, and repudiation of all the fundamental principles of evidence.

That the Court erred in admitting in evidence the sale slips unaccompanied by the usual checks of salesmen's indexes, adding machine and cash register totals, and different copies of receipts and vouchers, and the so-called record-book, Defendant's Exhibit "C," and in overruling the complainants' objections thereto.

XXXIV.

Because the District Court in its decision and reception of evidence erred in accepting unquestioningly over complainants' objection this opinion of defendant's hired expert Herrick, as to the defendant's own honesty and integrity based upon selfserving data selected by

the defendant *ex parte* weeks before the trial and placed in his witness' hands. Such opinion was not receivable in evidence unless based upon a thorough review of all the evidence in the case, and not upon *ex parte* statements of the defendant alone respecting his own honesty and integrity and to serve his own purse, regarding his dealings with the complainants. Such decision as to honesty and integrity was for the Court upon the entire evidence upon the trial to determine under the rules and decisions of equity.

XXXV.

The District Court erred in holding and concluding in its decision and accepting the said book of record or "cash-book" so called, Defendant's Exhibit "C," as a proper book of account of the trust fund or *sufficient in equity* upon an accounting by this trustee with his *cestui que trust* of his dealings with the trust fund.

The defendant's own witness Herrick testified, "The record is a very abominable accounting—the records from the standpoint of criticism, are abominable." It was the duty of this trustee to have kept proper books of account of the trust fund in his hands and his failure to do so constituted a strong presumption against him. Under the law and decisions this exhibit was manifestly not a proper book of account, especially in the absence and nonproduction of the person making most of the entries.

XXXVI.

In the absence of proper books of account by this trustee of the trust fund in his hands the District Court erred in not charging him with the full value of the fund in a sum aggregating at least its inventoried cost value. In the absence of proper books of account the burden rested squarely upon the defendant.

XXXVII.

Because the District Court erred in its decision and upon the trial in accepting the copies of the various original claimed vouchers mentioned in Herrick's "report" without the destruction or absence of the originals being accounted for; and permitting the paid expert of the defendant upon these unverified copies, to give an opinion as to whether the defendant had made a satisfactory accounting. That was for the Court under the rules and decisions of equity to determine.

XXXVIII.

Because the District Court in its decision erred in holding and concluding that every item in this defendant's expense account was satisfactory and fairly established.

XXXIX.

Because the District Court erred in its decision in holding and concluding and inferring the value of the trust fund in the hands of this trustee was only

about $18,000 and that other parties concerned did not differ widely upon that question.

XL.

Because the District Court erred in its decision in holding and concluding that $34,300 was the actual sound value of the stock.

XLI.

Because the District Court erred in its decision in holding and concluding that the statement rendered by this trustee and set forth in the complaint, which was forwarded to the companies with his purported "net balance" of $1,049 became an account stated between the complainants and himself as their trustee.

The District Court erred in its citation of cases and rule of law on this point to the effect that the burden of proof rested upon the complainants; the cases cited being where the fraud or error was apparent upon the face of the account. In the present cause Isaacs' statement to the complainants does not reveal his sale in bulk secretly to himself; nor his charge of commissions on such sale; and his fraud upon his beneficiary is not apparent from the closest scrutiny of the account.

XLII.

Because the District Court erred in its decision in holding and concluding that the complainants acquiesced for more than two years in their trustee's account without question or protest. The evidence shows his fidu-

ciaries had no knowledge of the frauds of their trustee nor anything to put them on inquiry until the revelations in the Seynei suit against Isaacs in the federal court. Their action was then immediate.

XLIII.

Because the District Court erred in its decision upon the wrong hypothesis of acquiescence in imputing laches to the complainants; and holding that laches short of the statute of limitations could be set up by an agent; the statute of limitations in actions for an accounting in California being four years; and the present action having been begun nineteen months before the statute expired.

XLIV.

That the said decision of the District Court is against law and against equity.

That the evidence is insufficient to justify the decision of the District Court herein.

That the District Court in its decision erred in holding and concluding that the complainants' bill should be dismissed and in its order and decree dismissing their said amended first amended bill of complaint and in awarding costs to the defendant upon such dismissal.

Argument.

The Bare Narration Alone of This Trustee's Dealing With the Trust Fund Consisting of the Merchandise of These Complainants Should be Sufficient to Reverse the Judgment of the Lower Court Absolving Him on Technical Grounds, Regardless of the Myriad Citations of the Principles of Equity Established by Other Chancellors and Courts of Equity Directly Negativing the Holding of the Trial Court and Its Surprising Dismissal of the Bill of Complainants in the Cause at Bar.

I Shall, However, for the Convenience of the Court, Review the Evidence Upon the Record, and, Briefly, These Decisions Already Well Known to Your Honors, as Bearing Upon the Facts Established in This Cause, Arranging Them Under Four General Heads:

I.

II.

III.

IV.

Preface.

The complainants charged that this defendant did not return to them all moneys taken in by him for their account under the pleaded agreement with them but had withheld sums from them, of which they asked discovery; and that the amount previously paid over by him to them with a final statement did not constitute a full accounting by this defendant as their trustee and that his figures and totals were false and untrue;[1] and that in the rendering of his said final statement "its falsity and the fact of the existence of moneys so withheld by him from them has been *sedulously* and *fraudulently* concealed by him to the present time."[2]

With reference to the clandestine sale in bulk of their merchandise by their trustee to himself the complainants further specifically charged that they never had knowledge of it at any time until shortly before the commencement of the present action and that the defendant at all times concealed the same from them and that in his final statement he made no mention of it nor of his withholding from them commissions of 20% on his own purchase; and that such transfer to himself by their trustee of their merchandise "*was a gross fraud and imposition upon them*"[3] and asked upon the accounting that it be set aside and that he be charged with the full value of the trust fund together with interest and his profits on it and that he return to them his commissions withheld upon the sale.

(1) Tr. p. 5.
(2) Tr. p. 7.
(3) Tr. p. 26.

And upon this appeal they earnestly insist that the lower Court throughout committed error in not so holding and deciding and not so charging their trustee upon his accounting (Assignment of Error VI).[4]

Before taking up in detail the various chapters relating to the evidence and proof upon the record, a few preliminary words may be of service to your Honors in a proper understanding of the cause. After the fire in the Bridge store in Seattle, George C. Main, an independent adjuster, and not a salaried employee of any of the complainant companies, was employed by them to adjust the loss.

The unfortunate condition of this adjuster during the time following the fire and the intimacies of his close private relationship to this defendant salvage man are not before your Honors through the District Court's refusal to receive any evidence of direct fraud;[5] nevertheless in this connection the record at least shows that Main was not in the store during the two weeks immediately following the fire consumed in the taking of the first inventory;[6] that Main wired Isaacs to come and asked him what was best to do; and Isaacs came and advised him; and that by this salvage man's own insistence Main allowed a compromise seemingly involving some $16,200 damage, and agreed to let Isaacs take the stock upon his offer of a guarantee of $18,100, although as Main himself testified, he "never put it

(4) Tr. p. 171.
(5) Tr. p. 78.
(6) Tr. pp. 48-63.

up to anybody else, no other quarters were bidding, and no one else entered into the transaction.''[7] Naturally Isaacs' interest was to advance as low a guarantee as possible, thereby making the damage estimate as high as possible. Main practically left it all to Isaacs and was a ready dupe although he testified he never agreed to $16,200 as damage and absolutely refused to pay it, and it was a compromise of figures only on condition that the purchase price be reduced to $34,300. Main further testified that upon this payment of $34,300 cash to the assignee of Bridge, Main turned the stock over to Isaacs, put it entirely in Isaacs' hands; and he continues—''as to his method of disposing of it, I put it entirely up to him. It was entirely in his hands. I had nothing to do with it. He could do as he pleased.'' Isaacs himself testifies he had the keys turned over from Main[8] and took possession of the stock; and the complainants' bill (uncontroverted by the answer) fixes the sole and exclusive possession and *control* of the merchandise upon the defendant in the following clear-cut terms:

> ''That the defendant after thus contracting with the complainants did actually take over *into his exclusive and sole possession and control* their said stock of merchandise and as their said trustee and upon the terms and conditions mentioned proceeded to sell the same.''[9]

(7) Tr. p. 119.
(8) Tr. p. 143.
(9) Tr. p. 4.

The *answer* (tr. p. 16):

"VIII.

Admits that defendant had in his exclusive possession and control said Bridge stock merchandise."

We therefore have this stock undeniably in the sole possession *and control* of the defendant. Now, what was its condition and value at the time he so took possession and control of it?

I.

THE VALUE OF THE TRUST FUND.

(a) Isaacs' returns grossly inadequate.

From a consideration of the actual value of this trust fund, it will be seen how inadequate Isaacs' returns were.

Its *wholesale* value at the time it came into the hands of this defendant as trustee was over $45,000;

Its *retail* value was $60,000; yet

He claims to have disposed of about one-third of it to the public for $17,807, at retail, and the balance to himself in bulk for $11,094 at wholesale; the two sales making a total for the entire stock of only $28,901 gross, or $19,149 net, *which is 58% less than the original cost to Bridge at wholesale.*

The record before the Court shows the fire was all over in 20 minutes; that it was confined to six feet of floor space;[10] that there was very little serious damage,

(10) Tr. p. 79.

only merchandise on one or two tables being damaged by the fire;[11] the total amount of which did not exceed $500; and that most of that was afterwards reconditioned and sold.

Mr. Main testified there was very little damage by fire. Mr. Mason even testified to the small amount (from $300 to $700) of serious damage which was all confined to one or two tables.[12] Everyone knows that smoke does not cause a permanent damage; shirts, underwear, etc., can be laundered and reconditioned; shoes and merchandise in boxes or cases, and rubber goods, would not be damaged at all. The various clerks all testified to the small amount of damage.

(b) The complainants' merchandise was marked and sold by Isaacs on an average of 20% above its wholesale cost prices in the first inventory.

Mr. Basher in charge of the shoe department testified that *90%* of *the entire stock* was good and undamaged; that the shoes were mostly marked above cost, i. e., cost to Bridge, by Isaacs for the complainants sale; and that about half of them were marked 20% above cost.[13]

Mr. Johnson, a salesman in the clothing department, testified that only 10% of the clothing was damaged in one way or another, although the clothing as a rule is more susceptible to damage than any other line in a store; and that yet this clothing for the complainants' sale was marked from 10 to 15% above cost.[14]

(11) Tr. p. 75.
(12) Tr. p. 117.
(13) Tr. pp. 85-86-87.
(14) Tr. p. 88.

Mr. Meyer, a salesman in the furnishings department, was familiar with prices all over the store, and testified that the stock was marked under the defendant's direction for the complainants' sale 15% above cost and better. He marked the furnishings, hats and caps, and they were all above the Bridge cost except those sold as leaders or burned; *that even the merchandise that smelled badly and was smoked* was marked above cost while the burned and watersoaked only was marked below; of these facts he was absolutely sure and no cross-examination could shake him.[15]

Mr. Jeremy, in charge of the clothing department testified that the fire was all over in 20 minutes and was confined to six feet of floor space; and that only merchandise on one or two tables was burned; and estimated the actual damage by fire at $500 or $600; and that the merchandise on Isaacs' sale for the complainants was mostly marked and sold 25% above its original Bridge wholesale cost, and that only the damaged was marked below. He testifies Isaacs instructed them to mark everything 25% above.[16]

Mr. Seynei was Isaacs' manager for the entire stock at the sale for the complainants, and testified the actual damage by the fire was only about $500, and that for the complainants' sale the goods were marked on an average of 20% above the Bridge cost price; and that only the damaged was marked below and some collars and overalls which were afterwards raised. That only

(15) Tr. pp. 89-90.

(16) Tr. p. 75.

the badly damaged merchandise was marked below and it was few and inconsequential;[17] in fact the stock was hardly damaged at all.[18]

The first inventory in evidence itself designates the exact number of articles damaged and of no value in the entire merchandise to be of the exact inventory value of $558.20. YET THIS DEFENDANT SWEARS, "THE FIRE BURNED THROUGH THE PREMISES" (it was by such misrepresentations that Main was influenced), but a *miracle* must have happened, for almost in the same breath the defendant says only three or four hundred dollars' worth of merchandise was burned, all of which was sold at different prices (tr. p. 152).

Merchandise which was marked by this defendant's own directions from 10% to 25% above the original Bridge wholesale cost and was sold on those markings could not have been badly damaged. Merchandise which realized at retail over $42,151 (as we will show later on) could not have been damaged much.

(c) It was a staple stock.

The record shows as the owner, Mr. Bridge[19] and Mr. Mason,[20] testified, this large stock, the biggest of its kind in Seattle, to have been a staple stock of standard merchandise and in good condition; $20,000 of it being new stock; and that its odds and ends had been sold off at a successful sale some months before the fire; and that Mr. Bridge was a man of wide experience in

(17) Tr. pp. 45-48.
(18) Tr. p. 45.
(19) Tr. pp. 92-93-94.
(20) Tr. p. 112.

the clothing business, having amassed an estate from $100,000 to $200,000 and had been successful up to the time of the fire; that he was a very close buyer and discounted his bills; and that he was forced into an assignment to the Seattle National Bank, to whom he owed a mere $15,000 indebtedness borrowed from the bank to enable him to discount his bills for this new merchandise.

The first inventory (Plffs. Ex. C) was taken immediately after the fire under Mr. Mason's (adjuster for the assignee of the assured) direction and included everything on the premises. It was taken at the original cost prices paid by Mr. Bridge less the freight and discounts and this inventory is conceded by all parties and even by the trial Court to have been correct. Its amount was $45,954.48 at Bridge cost prices. Mr. Bridge testified that if the freight and discounts were added, the wholesale cost of the stock to him would be over $50,000, and that its value as a whole *after* the fire was at least that; and that if he had been let alone, he himself would have had a sale and netted 15% above the amount of this first inventory.[21]

(d) Bridge's assignee sacrificed the stock when he sold it in bulk to complainants for $34,300 cash.

Mr. Mason testified that as the representative of the bank he was instructed to make a quick settlement, as another rental of $920 was coming on which the bank did not wish to pay, and that the creditors (the bank being the principal one) were clamoring for their

(21) Tr. p. 93.

money; and that thus acting under and only by virtue of his direct instructions and orders he sold the stock to the complainants for $34,300; but his own two capable men had examined the stock *after* the fire and reported it then worth some $39,000, and that the very lowest he himself personally would have consented to take for it at wholesale in bulk after the fire would have been $36,000.[22] Mr. Bridge never consented to selling it at $34,300 and is suing his assignee for sacrificing his stock at that price.[23]

Mr. Mason further testified that he knew the stock well and the stock in the hands of such an expert as Isaacs should have sold at the first inventory Bridge cost prices and that the best of it should have sold way above, and that he should have been *disappointed if it had failed to bring the prices marked in the first inventory.*[24]

Both Mason[25] and Main[26] testified an estimated loss does not mean a total loss, sometimes 50% of the loss can be recovered; also that for the purpose of a fire sale such a stock was worth from 20% to 50% more than at an ordinary sale. Mr. Seynei and Mr. Jeremy testified that a fire is a big drawing card, merchandise sells quicker and to better advantage than at an ordinary clearance sale.

(22) Tr. p. 112.
(23) Tr. p. 93.
(24) Tr. pp. 113-117.
(25) Tr. pp. 112-113.
(26) Tr. p. 119.

Mr. Seynei, who had been with Bridge as his manager for many years, and knew the stock as no one else save Bridge could know it, testifies as follows:

> "Its retail value before the fire averaged about 33⅓% above its wholesale cost, making the stock of goods about $60,000 in value. There was very little difference in the retail selling value before and after the fire. The actual damage to the stock by the fire did not exceed $500. After the fire that stock of merchandise would sell quicker, to better advantage and you could get more for it than during a clearance sale. In round figures the value of the stock after the fire in the hands of an expert like the defendant would not be any different than the original price before the fire; the retail price value being something like $60,000. On a fire sale, as a general rule, the percentage a stock is worth over an ordinary sale is about 20%; about 20% more than at regular sale. A fire sale speaks for itself."[27]

That $48,000 was invested in that stock and the stock was worth 100 cents on the dollar at cost prices.[28]

Mr. Jeremy, who managed the clothing department constituting over one half the stock, and who is an expert merchandise man with experience in England, Canada and the United States, testified also the stock after the fire was worth $60,000 at retail.[29]

(*Yet, the District Court in its opinion and decision held its value to be only $18,000.*)

Isaacs' own figures show he sold about *one-third of it* at retail to the public for the complainants for *$17,800.*

(27) Tr. p. 45.
(28) Tr. p. 63.
(29) Tr. p. 75.

As to the balance Isaacs in his second inventory of $24,600, and in his statement in his own handwriting on the Hotel Herald stationery, Complainant's Exhibit 16;[30] and in his declarations to Mr. Seynei, his partner, that this merchandise as shown by this second inventory "was worth *one-hundred cents on the dollar,*" himself gives unequivocal expression as to its actual value.

> "The defendant spoke at the time of the profit, about $13,000, he made on the transaction of the sale in bulk at that time and said he had made a successful purchase from the complainants."[31]

Mr. Mason also testified that to this $11,094 paid by Isaacs for this balance of the Bridge merchandise, would have to be *added* the *profits,* which should be about $6800, *and* the *expenses* in order to arrive at the actual value of this portion of the stock.

Isaacs advanced a *net* guarantee of $18,100.

This guarantee, Main, a close friend of Isaacs', and a very adverse witness to the complainants, his former employers, testified in no wise represented the value of the stock even at wholesale,[32] and that he expected considerably more than this guarantee would be netted by the companies, and he wrote the complainants to that effect September 8, 1913, otherwise there was no object in their taking over the stock, as the estimated damage did not mean a total loss as much of it could be reconditioned and sold; and that he had refused to

(30) Herein p. 166.

(31) Tr. pp. 62-63.

(32) Tr. p. 120.

allow $16,200 as damage and that he got the valuation down as low as possible so that these companies could buy at wholesale in bulk and sell at retail and make a large gain. Main wrote these complainants September 8, 1913:

> "Finding I could not agree with Mr. Mason, I took the other tack of getting the sound value down as low as possible with the idea of eventually taking the stock." [33]

In this cause, therefore, the "sound value" so called in reality represents a *purchasing price at wholesale,* and to this purchase price should be added the expense of selling and the profit in order to arrive at a correct and fair selling valuation.

Every stock has two values—a buying and a selling. This equity suit has to do with the *selling value,* i. e., What Did Isaacs Realize for This Entire Stock at Retail?

Thus the complainant companies paid $34,300 cash for the Bridge stock *in bulk at wholesale,* expecting to realize a gain by selling it out again through this trustee *at retail* to the public.

This honest salvage man, however, says he sold about one-third of it to the public for $17,800, and the two-third balance to himself for $11,094, the total thus averaging gross 40% *below* its original Bridge inventory cost of $45,954.48 (which cost did not include the freight and discounts paid by Mr. Bridge). Fortunately we have records, which show exact figures and give

(33) Tr. p. 234.

him the lie direct; these are the books of his own partnership referred to herein as the Seynei books.

(e) The actual selling value is shown to be above the prices given in the first inventory.

Isaacs formed a partnership with Mr. Seynei for the purpose of handling this balance of the stock purchased by him and they conducted a sale under the name of *Harry Seynei* at the same location.[34]

The Seynei books in evidence show that that portion of the "tail end" of the Bridge stock, the "remnant", which was sold at the Seynei *seven* weeks sale realized $13,980.02.[35]

The entire balance or the whole ⅔ of Bridge stock sold in bulk by this trustee to himself realized at retail $24,351,[36] which amount added to Isaacs' purported cash sales of $17,800 at the insurance retail sale makes the total retail receipts for the whole stock $42,151, which amount does not include Isaacs' depreciation, hidden returns, gifts to adjusters, etc., which would show the stock actually sold above the first inventory cost prices.

It may be readily seen that at the trial Court's accepted valuation of only $18,000 for the whole Bridge stock, some one must have made a large profit; and it must have been Isaacs. These complainants only received $19,149.81 net (guarantee $18,100 and final payment $1049.81) for this entire Bridge stock for which

(34) Tr. pp. 53-159.
(35) Herein p. 68.
(36) Herein p. 72.

they paid in cash $34,300, expecting to sell at a large gain, as Main says, over the purchase price.

(f) Its actual selling value as shown by the books of the defendant's own partnership.—Examples.

It is proven by the Seynei books in evidence before this Court that this trustee made a personal profit on his manipulation of the trust fund away from the *cestui que trust* of ten per cent (10%) above the original Bridge cost price on this "remnant" which he bought in bulk net at 65% below the original cost price.[37]

The summary[38] by Klink, Bean & Co. of these Seynei books shows Isaacs' partnership added small purchases from time to time to this Bridge stock, the new stock so purchased aggregating in all $6263.78 and representing one-sixth (1/6) of their entire stock; that the total cash sales were $16,067.94, and the total profit was $1,784.38 over and above the original cost of this merchandise; thus we have the exact amount realized at that sale. Mr. Klink testifies:

> "In dollars and cents the profit was about $500 on the new stock, and about $1200 on the Bridge stock.
>
> "The actual amount of profit on the Bridge stock alone was $1262.40 above its inventory cost."

Mr. Seynei testifies:

> "I have testified that one-quarter of the new stock was sold for $1565, at one-third profit, or approximately a profit of $521; and by deducting that from the total profit of $1784 you find the

(37) Tr. p. 83.

(38) Tr. p. 228.

profit on the Bridge stock alone, about 10% profit on the remainder of the stock; about $1200. Thus the Bridge stock on the Seynei sale sold for $1264 more than its inventoried cost price; which is about 10% above cost.

The merchandise at the insurance sale did not sell 20% below cost as claimed by Mr. Isaacs."[39]

Mr. Jeremy testifies:

"One quarter of the new stock sold at the Seynei sale and had a profit of 33⅓%."[40]

To eliminate the new stock entirely and to be more than fair to this trustee, I present two examples based upon varying proportions of this $6263 of new stock which was sold at the Seynei & Co. sale, in ascertaining his profits on the Bridge stock alone at that sale. The amounts are taken from the Seynei books by Klink, Bean & Co., accountants, and these examples are prepared by them.

First Example:

If one-fourth (¼) of the new stock of $6263.78 purchased after Inventory No. 2 were sold at a profit of 33⅓% there would have been a profit on the *Bridge stock alone* of *9.93%* above the original Bridge cost.

	Total	New Stock	Bridge Stock
Sales	16 067 94	2 087 92	13 980 02
Cost of Goods Sold	14 283 56	1 565 94	12 717 62
Profit	1 784 38	521 98	1 262 40
Per Cent of Profit to Cost	12.5%	33.3%	9.93%

(39) Tr. p. 61.

(40) Tr. p. 78.

In other words Isaacs sold this Bridge stock about 10% *above* the original Bridge cost in the first inventory.

Second Example:

If *all* of the new stock of $6263.78 purchased after Inventory No. 2 were sold at a profit of 33⅓%, there would have been a loss on the Bridge stock sold of 3.8%.

	Total	New Stock	Bridge Stock
Sales	16 067 94	8 351 70	7 716 24
Cost of Goods Sold	14 283 56	6 263 78	8 019 78
Profit	1 784 38	2 087 92	303 54
Per Cent of Profit to Cost	12.5%	33.3%	Loss 3.8%

On that hypothesis, in other words, this Bridge merchandise sold only about 3% below the original Bridge cost.

In order to remove any confusion in your Honors' minds as regards the actual amount of sales of this new stock and to give this defendant the benefit of every conceivable argument in the premises, I emphasize to your Honors the second example that *if all the $6263 of new stock* was sold (prima facie this is impossible for at the end of this Seynei & Co. sale over half of their partnership stock was left as shown by the third (3rd) inventory, Complainants' Exhibit 9[41] totalling $16,633.57) the Bridge stock alone sold at only some

(41) Tr. p. 220.

3% less than its original Bridge cost as given in the first inventory!

If we examine the shoe department separately,[42] it will show that the Bridge shoes alone at this Seynei sale sold 15% above the original Bridge cost prices, after granting that *all* the new shoes were sold and at a profit of 33⅓%, prima facie this is impossible as one-half of the stock was later shipped to San Francisco.

Likewise the clothing[43] which represented about one-half of the entire stock at all times was sold *above* the original Bridge cost prices, and the clothing at the Seynei sale was practically *all Bridge clothing* for less than 1/16 was other than Bridge clothing.

These figures all show the actual selling value of the "remnant" to be at the very least about inventory cost prices, and in many instances *far above,* all of which directly impeaches Isaacs' purported returns (gross) at complainants' retail sale of only $17,800, which are 20% *below* that same actual original Bridge cost as given in that first inventory.

Even if we deduct all the expense, $3133[44] of selling as shown by the Seynei books, the *net* returns from the Bridge stock at the Seynei sale would average nearly *10% higher* than Isaacs' purported *gross* returns at the Insurance Retail sale. The evidence was the same selling prices were left on the tags for both the Seynei and the Insurance Retail sale.

(42) Tr. p. 229.
(43) Tr. p. 229.
(44) Tr. p. 227.

The statement of this trustee and his production of only sales slips amounting to $17,800 strains credulity to the breaking point.

(g) The actual amount realized by this trustee from the portion of the trust fund transferred to himself in bulk.

Now, a time finally comes when both the Bridge and this new stock was entirely disposed of by Isaacs. His partnership sales as shown by the Seynei books and their summary by Klink, Bean & Co. (Plffs. Ex. 18),[45] in evidence, amounted to $16,067.94 and the balance of this merchandise was brought to San Francisco by Isaacs; and a third inventory taken of it at that time showed they still had $16,633.57 left; and Judge Van Fleet in the Seynei case, Equity Cause 83, Northern District of California, placed the actual value of that remainder at the amount named in this same third inventory or $16,633.57.[46] So the $16,067.94 realized by this trustee's partnership at the Seynei sale and the stock they had left after it as shown by this third inventory in the sum of $16,633.57 makes in all $32,701.51.

This consists of the $6263.78 of new stock and Bridge stock. The record shows this new stock was sold at one-third profit, by the testimony of Mr. Seynei and Mr. Jeremy, and the defendant nowhere denies it, making the receipts from the new stock $8350.30, which deducted from the above total of $32,701.51 leaves $24,351.21 for the Bridge stock alone, being the amount Isaacs actually realized for this stock. He paid $8875

(45) Tr. p. 227.

(46) Tr. pp. 159-160.

for it, thus Isaacs realized *$15,466.21 more than he paid these complainants for it;* and yet the District Court held that $18,100 was a correct value of the entire Trust Fund and dismissed these complainants out of Court! (Assignment of Error XXXIX, tr. p. 206.)

Isaacs' partnership sales, as shown by the Seynei books		$16,067.94
Leaving amount of merchandise remaining as evidenced by the third inventory (Complts. Ex. 9) at		16,633.57
Total		$32,701.51
New Merchandise (other than Bridge stock)	$6,263.78	
33⅓% profit thereon as testified to by various witnesses	2,086.52	
Making total sales of merchandise other than the Bridge stock		8,350.30
Total amount realized from the Bridge stock purchased by Isaacs in bulk		$24,351.21

Those are the exact figures taken by Klink, Bean & Co. from the Seynei books and the third inventory; and they represent a rather good sized personal profit for this trustee to make off his beneficiary on the poorest part of their merchandise as compared with his actual returns of $28,901 to them on their *entire* stock which returns were $5399 less than these complainants actually paid Bridge's assignee in cash for it in bulk at wholesale. These figures are gross. Taking Isaacs' *net*

returns to the complainants of $19,149 from the $34,300 cash paid the assured, *these complainants in reailty lost $15,151* through their trustee's dishonest manipulation of the trust fund for his individual personal gain.

I have shown that Isaacs' personal profit on their merchandise was $15,466. *That profit should have gone to the complainants.*

RECAPITULATION.

From the foregoing evidence it is clearly to be seen that the value of the trust fund was greatly in excess of Isaacs' false and depreciated returns and that it was at least of full inventory value, for your Honors will not overlook the facts:

1. The entire Bridge stock was a staple stock.

2. The small amount of damage as testified to by disinterested witnesses.

3. Also they testified, even such an estimated loss is not a total loss. Goods can be reconditioned and sold at a profit. The adjusters Main and Mason and Mr. Seynei and Mr. Jeremy testified that for the purposes of a retail fire sale such a stock of goods was worth from 20% to 50% more than at an ordinary sale; and that such is the case is really axiomatic with anyone acquainted with handling merchandise for fire sales.

4. The price at which the goods were marked and sold by Isaacs, being on an average 20% *above* their original Bridge cost price.

5. Mr. Bridge, the owner, testifies that *after* the fire his stock was worth over $50,000.

Mr. Seynei, the manager, testifies the stock was worth $60,000 at retail.

Mr. Jeremy, the head salesman, testifies the stock was worth $60,000 at retail.

6. Even this trustee admits and the evidence shows he sold about one-third of it at retail for $17,800.

7. Mr. Mason also testifies he personally would never have sold the stock in bulk to the companies at less than $36,000 at a *wholesale* price; and that the merchandise should have sold at retail at and above its original Bridge cost prices as shown by the first inventory.

8. The Seynei books and third inventory in evidence show that on the balance of this same stock this trustee realized about $24,350, thus making some $42,151 in all which he must account for, and does not include Isaacs' depreciation and hidden returns.

9. The personal profits realized by Isaacs as shown by the Seynei, his partnership books, to have been 10% above the original Bridge wholesale cost in the first inventory, on the "remnant" or poorest part of the stock.

10. The actual amount realized by Isaacs from all the merchandise transferred to himself in bulk being $15,466 more than he paid for it.

11. Isaacs' own valuation as to this balance purchased by him being of inventory value by his statements to Mr. Seynei, his partner, and his admission, in his own handwriting on the Hotel Herald stationery (Complts. Ex. 16) of the stock sold to himself in bulk

to be worth $24,603 and his statement to Seynei that it "was worth one hundred cents on the dollar", give unequivocal expression as to its actual value, as well as the entries in his own partnership books.

12. Mason testified that to this purported $11,094 paid by Isaacs for this balance of the merchandise would have to be *added* the *profits,* which should be some $6800, *and* the *expenses,* in order to arrive at the actual value of this portion of the stock.

13. The valuation at inventory cost prices of the tail end of this stock after the Seynei sale as shown by the third inventory, and as established by Judge Van Fleet in the Seynei case as its actual value.

Never throughout the entire history of the selling at retail of this whole stock does its selling value fall below Bridge inventory values except in Isaacs' purported returns at the retail insurance sale, and which returns I shall show are false and untrue.

II.

THE INSURANCE RETAIL SALE BY THIS TRUSTEE FOR THE COMPLAINANTS.

(a) He claims to have received gross only $17,800.

On September 6 Isaacs opened the insurance retail sale.

For merchandise inventoried at $21,301 (difference between the first and second inventories) this defendant claims to have received at this retail sale but $17,800 (gross), being 20% below the same original Bridge cost.

(b) Five of his own salesmen give him the lie direct.

Messrs. Bascher, Johnson, Meyer, Seynei and Jeremy testified without contradiction by any salesman produced by the defendant, that upon Isaacs' sale for these companies their stock was marked and sold at 10% to 25% *above the Bridge cost* prices in the first inventory. For instance:

MR. BASCHER.

Mr. Bascher was his salesman in the shoe department. He testified the shoes were mostly marked at their Bridge inventory cost and above; at least one-half were marked and sold 20% *above;* and that nothing was marked down from the original Bridge cost price—most everything marked above; that 90% of the entire stock was good and undamaged; that it was a successful sale and the same prices were left on the merchandise for the Seynei sale, and that it was not remarked; and that the best of the shoes sold first; and that there had been a cleanup sale before the fire, after which much new merchandise was bought.[47]

MR. JOHNSON.

Mr. Johnson was Isaacs' salesman in the clothing department. He testified that the clothing was marked and sold from 10% to 15% *above* the original Bridge cost prices; that the clothing in one way and another was less than 10% damaged, although it is more susceptible to damage than any other line.[48] It was a successful sale; that the best sold first, and that the

(47) Tr. pp. 85-6-7.

(48) Tr. p. 88.

same selling prices were left on the goods for the Seynei sale.

MR. MEYER.

Mr. Meyer was Isaacs' salesman in the furnishing goods department. He testified that he marked the furnishings and hats and some pants for the insurance retail sale; that they were all marked and sold 15% *above* the Bridge inventory cost prices and better. To quote his exact words:

> "I am absolutely sure that everything that goes under the heading of furnishings, hats and pants and underwear was marked above the Bridge cost; the stuff that was burned and water-soaked was marked below, but the stuff that smelled badly and was smoked was *not cut down below cost.*"

That he sold all over the house and knew on that insurance retail sale that the other departments were all marked above the original Bridge inventory cost prices; and that the same prices were left on the goods for the Seynei sale. A few odds and ends only were cut from the original Bridge cost prices, and that of these some were raised later, as for instance overalls and collars. The little merchandise sold at reductions was damaged or was sold as leaders. That there was a clean-up sale before the fire, after which much new stock came in.[49]

MR. SEYNEI.

Mr. Seynei was Isaacs' manager of the insurance retail sale for the complainants. He testified that the stock on that sale was staple, and in good condition,

(49) Tr. pp. 89-90.

and included some $20,000 of new stock which had come in. That he was in full charge of the marking of the merchandise for that sale and that he personally directed how the stock should be marked. That the complainants' merchandise was marked for that sale on an average of 20% above the first inventory Bridge wholesale cost; and that there was nothing marked below cost except a little used as leaders, and this percentage marked below was very little and very inconsequential. That the goods were sold on these markings and there were no cuts in prices. Some prices in fact were raised during the sale, such as shoes, overalls, and collars; and that the prices were all plainly marked. For instance, as shown by the sales tags (Plffs. Ex. 1) in evidence of a suit which cost $9.50 and sold for $12.75; another which cost $7.75 and sold for $12.50; another which cost $8.50 and sold for $11.75; another at $11.50 sold for $13.50; another at $7.00 sold for $10.00.[50] That at a so-called "fire sale" such as this, the merchandise is highly advertised and you can get better prices than at ordinary sales. Mr. Seynei testified the sale was most successful and that there was no reason for stopping it and closing it down except that Isaacs wanted to get the stock for himself. Three days before the sale closed Isaacs stated to several people, including Seynei, that he had made *his guarantee ($18,100) good above all* expenses.[51]

After the sale in bulk to himself by Isaacs the same tags and prices were left on the merchandise

(50) Tr. pp. 48-49.

(51) Tr. p. 50.

for the Seynei sale as had been on for the complainants' retail sale; and from his personal knowledge and as his books in evidence show that balance sold at the Seynei sale 10% *above* the original first inventory Bridge cost prices.

MR. JEREMY.

Mr. Jeremy was Isaacs' salesman in charge of the clothing department on his retail sale for the complainants. He testified he assisted the manager Mr. Seynei and was most familiar with the Bridge stock on that sale; and that at that sale there was between $20,000 and $22,000 new merchandise in the stock. That the merchandise at that sale was mostly marked about 25% *above* the original first inventory Bridge cost prices and was so sold as it was marked. That the defendant and Mr. Seynei gave the instructions as to the merchandise being so marked 25% above the Bridge cost; and that over three-quarters of the stock was so marked. That he personally marked the clothing himself which represented the biggest part of the stock. All was marked above cost except that which was actually burned, which did not amount to over $500. That *before the retail sale closed* he heard Isaacs say he was *"on velvet"* right then.[52] The merchandise on this insurance retail sale sold rapidly and he could see no reason for closing the sale down as it was running along all right.[53] Everything was all plainly marked and the same prices were left on for the Seynei sale. That at such a sale as this retail

(52) Tr. pp. 75-76.

(53) Tr. p. 77.

sale or so-called "fire sale" the fact there has been a fire is a big drawing card and the stock sells at better advantage than at an ordinary sale.

(c) Mr. Bridge and Mr. Bailey also contradict the defendant's abbreviated returns of $17,800.00.

MR. BRIDGE.

Mr. Bridge, the owner of the stock, testified it was a staple stock. No odds and ends. In making up his inventory he did not add freight to the cost price, nor his discounts. His stock was over $50,000 in value *after* the fire. He could have sold this merchandise himself from 15% to 20% *above* the first inventory cost prices if he had been let alone. That after his clearance sale of odds and ends before the fire he filled in the stock with $20,000 worth of new merchandise.

That he was in the store every day during Isaacs' insurance sale for the complainants and examined the tags on the goods, and was familiar with the way it was marked and sold. For instance, some $7.00 and $8.00 suits were marked $12.33, $14.75; $10.00 and $11.00 suits were marked $17.85.

That nothing was marked below cost and the merchandise on that retail sale was marked at a fairly good profit. Isaacs himself told people it was a very successful sale. *Before the close of the sale* he heard Isaacs say he had then taken in *both all his guarantee and expenses.* That he himself before the fire conducted a clearance sale and cleaned up at a profit

of 20% to 25%. That the cost mark on the merchandise as given in the first inventory shows what he actually paid less the discounts and freight which he did not add. He was very much surprised when Isaacs closed down the complainants' sale at retail.[54]

Mr. Bailey — Isaacs' Own Admissions.

Mr. Bailey had his office near the Bridge store, and was in the store frequently every day or two during the sale. He met Isaacs for the first time the morning the insurance retail sale opened in September, 1913, and had many conversations with the defendant after that during the sale and testified the defendant told him the complainants' sale was going along very satisfactorily; that it was going beyond his expectations both in volume of goods sold and prices received.

That he had two conversations with Isaacs during the last week of this retail sale in relation to the proceeds of the sale and the amount of Isaacs' profits.

In the first, the forepart of the week, Isaacs said the sale had gone very favorably; that he was going to get out of it that week his entire guarantee ($18,100), expenses and commissions.

That in the second conversation later in the week on the Saturday the retail sale closed, Isaacs stated emphatically to him that the sale *had paid then all of his guarantee, expenses and commissions,* and that he had gotten unusually good prices; that he had gotten above the original cost prices for the goods, and that

(54) Tr. pp. 94-95.

the sale was a complete success; that while the stock was being advertised below the original Bridge cost, *the merchandise really was selling above, that he had realized nearly 20% above the original Bridge inventory cost;* and boasted that he, Isaacs, could get more out of such a sale than others usually could; and that the defendant was beaming with satisfaction.[55]

Mr. Bailey testified the sale was the largest ever held in that part of the State and that the crowd of people in the store was so great they had to have police help, and often a doorkeeper to close the doors to shut out the crowd of buyers pressing in.

That he was also told by the different salesmen for Isaacs on that sale that the sale was bringing above the inventory cost of the merchandise while they were advertising they were selling it below.[56]

That he had equal knowledge of the Seynei & Co. sale following the complainants' retail sale; and that the insurance retail sale was equally as successful as Isaacs Seynei & Co.'s sale; and was at a little better figure.

(d) The testimony of various experts shows the defendant's purported retail returns to be way below the real selling value of the merchandise.

Mr. Mason, the adjuster for Bridge's assignee, testified:

> "It was a staple stock. I consider a stock in competent hands handled as a fire salvage stock

(55) Tr. pp. 97-98.
(56) Tr. p. 100.

> would yield anywhere from 25%, 30%, 40% or possibly 50% above its actual value. The first day of the retail sale the defendant told me the proceeds were something like $4000. He spoke very optimistically of it.''[57]

Also that on the insurance retail sale for the complainants that that stock should have sold at retail at the Bridge inventory cost in Isaacs' hands; that the best sells first and should have sold way above inventory cost; ''and if the defendant's statement shows that that stock brought 25% below, I would be disappointed in the returns. I would consider the sale very disappointing.''[58]

Main and Mason, Seynei and Jeremy, all experts, agreed in their testimony that a fire sale is thus a big drawing card and that a stock at a ''fire sale'' should bring from 25% to 50% over and more than at ordinary sales. Main testified that merchandise can be reconditioned and sold; sometimes 50% of the loss is recovered,[59] and it is quite evident with such a stock as this, where there was practically no damage by fire, the amount of recovery would be the maximum, for this was not a perishable stock of dainty silks and laces, but consisted of Alaskan outfits, rubber goods, leather goods, shoes in boxes, men's underwear and clothing.

(57) Tr. p. 112.
(58) Tr. p. 117.
(59) Tr. p. 119.

(e) His own partnership books contradict this trustee's memorandum "cash book" and its purported sales entries of only $17,800.

The mute testimony of the elaborate books of H. C. Seynei & Co. in evidence, certainly not made out with this litigation in view, and which were kept by a competent, disinterested bookkeeper, and their summary by Klink, Bean & Co. (Plffs. Ex. 18), substantiate the foregoing facts and disprove this trsutee's purported receipts, for they show that after this trustee's transfer of the balance of the complainants' merchandise in bulk to himself at wholesale, that this "tail end", or as the defendant and his counsel so naively refer to it—"the remnant"—*sold 10% above the Bridge cost prices in the first inventory.* After deducting the expense of selling, it sold *net* on an average of *10% higher* than his purported *gross* returns.

Yet our honest salvage man represents he sold at the retail sale the best of this stock 20% *below* Bridge cost prices and that the price he claimed to have received for it was above its actual value; and the District Court accepted his figures.

From the foregoing evidence of five of the defendant's own salesmen, of Mr. Bailey and Mr. Bridge and Mr. Mason, we gain an accurate knowledge what the trust fund which came into Isaacs' hands sold for; for the evidence is all to the effect that the goods was mostly marked and sold on an average of *20% above* the Bridge cost prices as given in the first inventory. That at those prices it sold rapidly at one of the most successful sales ever conducted in Seattle. These

Seynei books of Isaacs' own firm also give mute evidence that that portion of the stock at the Seynei sale *after the best had been sold at the insurance retail sale realized 10% above these same Bridge cost prices of the first inventory.*

These are not figured computations by a lone hired witness, nor have they been contradicted by the defendant in any way, but from witness after witness produced by complainants and all from disinterested sources. Moreover, we have the defendant's own statements as to the amount taken in being equal to his guarantee, $18,100, *and all expenses.* This is all sufficient to establish the value of this trust fund and its proceeds at the retail sale as far greater than represented by this trustee in his purported "cash receipts" of $17,800, which is 20% below Bridge cost prices.

I shall, however, for the further information of this Court, proceed to expose this trustee's false accounting upon the trial and selected data furnished the Court, and his fraudulent methods in concealing the true and correct receipts from the complainants' merchandise and his dishonesty and treachery in obtaining for himself the possession of the balance of it for a grossly inadequate consideration far below its actual value and for a mere song.

Further, neither does Isaacs' self-serving declarations, his selection of loose-leaf sales slips, his purported *pencil* "cash book", or bank deposits, verify the integrity of this purported $17,800 total cash sales on his retail sale for the companies, and the most his witness Herrick, the loyal accountant, can do is to

claim for him that "unless they are false, they are correct".

These companies by direct proof show they *are false* and like all this trustee's totals they "are false and untrue" and that the fact of their falsity, in the words of the bill, "has been sedulously and fraudulently concealed by the defendant to the present time", and that his unfortunate showing is, to say the least, inaccurate, contradictory, spurious, and sophisticated, and in no way represents the true value of the trust fund or its proceeds, and that the decree dismissing their bill and the District Court's filed opinion therewith are unsupported by the great preponderance of evidence upon the record, and constitute reversible error thoughout.

(f) The trial court entirely avoided the issue by holding every presumption to be in favor of the defendant and against the cestui que trust; which was reversible error clear and unmistakable (Assignments of Error I and II, tr. p. 170).

That the presumption should be in favor of the complainants is too elementary to be even discussed.

III.

THIS TRUSTEE'S ACCOUNTING UPON THE TRIAL.

This Trustee's Showing Utterly Insufficient to Establish the Integrity and Correctness of His Figures in the Face of the Explicit and Direct Showing of Error, Fraud, Undue Advantage and Gross Inadequacy of Consideration and the Burden of Proof Placed Upon Him in Equity by His Fiduciary Relation and Sale to Himself and Personal Profits From the Trust Fund in His Exclusive Control.

This trustee having failed to establish the correctness of his representations and figures to the complainants and having failed to keep proper books of account of the trust fund and having commingled the trust funds with his own personal funds, should be charged with the full amount of the principal consisting of the trust fund, or at least with its inventoried cost, $45,954.48, with interest thereon less the amount he has already paid.

It is manifest error on the face of the record and the District Court erred in deciding and holding that the defendant had fully established the integrity of his figures and that no fraud or error had been shown or undue advantage taken by himself as trustee, and that the defendant's sales slips had not been impeached, and that the burden of proof rested upon the complainants, and in its dismissal of their bill before the Court.

In this regard the complainants respectfully cite to your Honors their assignments of error at pages 170 to 210 of the transcript, and numbered therein from I to XLV.

(1) Isaacs' So-called "Cash Book" (Defts. Ex. C).

(a) Not a proper book of account by a trustee of a trust fund but in fact a highly sophisticated one and no more authentic than his sales slips.

In an effort to bolster up his false returns of the trust fund this trustee produced a memorandum book with pencil entries mixed up with a lot of other accounts. The defendant's own witness Herrick said it was a crude, primitive book, "an abominable accounting",[60] and not properly a "cash book", also that *its entries are made in lead pencil*[61] and are not a record of each individual sale;[62] and there is no check or audit by means of which it can be determined if its entries represent the entire cash sales. Herrick testifies its entries are only correct upon the *"assumption"*[63] that they represent all the sales and he has no way of determining if they do.

(b) Not a complete record.

Mr. Olney. Q. If this book is made up from the total cash in the drawer each night at the conclusion of business, then is it not also an incomplete record in that it might not show the sums of money taken out during the day, or not put in the drawer during the day?

The Court. I do not think it is necessary to ask an expert witness to deduce conclusions which are inevitable. If money was taken out of there, the book, of course, does not show it. His conclusions do not amount to anything. You are asking

(60) Tr. p. 141.
(61) Tr. p. 134.
(62) Tr. p. 136.
(63) Tr. p. 242.

him to deduce a conclusion which is self-evident to any man."[64]

Thus *it is not a record of the cash taken out of the cash drawer* during the day; nor is it a record of the *cash not put in the drawer* during the day; *therefore it is not a complete record of all the sales,* for this trustee *paid all expenses out of the cash receipts in the cash drawer;* and hence these expense items do not figure in the making up of this "cash book".

If the "cash book" totals correspond with the sales slip totals (and the most Mr. Herrick can say is they "appear" to "unless they are false"[65]) it shows the cash sale entries therein are not a complete record for many sales slips were depreciated and many are missing, as we will show in detail later and as Seynei[66] and Isaacs[67] himself testified, and the figures of Klink, Bean & Co. prove; and we estimate this shortage alone at several thousand dollars worth of merchandise, the receipts from which evidently were not put in the cash drawer at all but concealed in Isaacs' safe deposit box and probably forwarded to San Francisco by express.

(c) No one saw its pencil entries of sales but the defendant.

It is also interesting that its pencil entries of sales (p. 68) *are made exclusively by Isaacs.* His own manager, Mr. Seynei, testifies:

"I never saw any books kept by the defendant on that sale. I handled the sale for him and would

(64) Tr. pp. 140-141.
(65) Tr. pp. 131-137.
(66) Tr. pp. 50-51.
(67) Tr. p. 151.

have had knowledge if any books were kept, but I did not see any books."[68]

Mr. Jeremy, Isaacs' head salesman, testifies:

"The defendant did not employ a bookkeeper or cashier on his sale for these complainants, only his wife and daughter were employed as such. The defendant and his family handled all the cash. I did not see any books being kept of the insurance sale."[69]

Isaacs testifies:

"They had not arranged for a cashier and I asked my wife and daughter to act as such.

"On the 5th of September, 1913, accompanied by my wife and daughter I returned (from San Francisco) to Seattle."[70]

Isaacs thus took his wife and daughter all the way from San Francisco to Seattle, *one thousand miles,* to act for him as cashier to thus keep secret the amounts of monies from the complainants' sale.

Isaacs would hardly pay out several hundred dollars to take his wife and daughter from San Francisco to Seattle to work in the Bridge store there for only three weeks without some hidden motive for personal gain, especially in view of his testimony—

"I made no charge for the services of my wife and daughter."[71]

Mr. Seynei testifies:

"The sales tags were taken possession of every evening by the defendant and his wife and daugh-

(68) Tr. p. 50.
(69) Tr. p. 77.
(70) Tr. p. 143.
(71) Tr. p. 154.

> ter. On the sale for the complainants, the retail sale, the cashier was Mr. Isaacs, Mrs. Isaacs and Miss Isaacs.''[72]

In this regard I call your Honors' particular attention to the fact, Isaacs did not produce on the stand his wife as his cashier to verify his accounts and for cross-examination by the complainants.

Mrs. Cohn, his daughter, testifies that the cash in the drawer was only counted occasionally; that she had nothing to do with this ''cash book''; that she had no way of knowing of the amounts put in this ''cash book'' and did not know whether at that time they corresponded with the sales slips;[73] thus this trustee's own daughter was not allowed to see the entries made in his ''cash book''.

I can but refer to these daily sales entries in this little memorandum book, in the words of Judge Lacombe referring to a somewhat similar situation—*In re Feldstein,* 115 Fed. 262—

> ''He alone kept them; the bookkeeper never made a single entry in them,—never saw them. They were kept secret and apart,—his private, personal memoranda; always in his personal custody, concealed from everyone. This certainly is not the '(keeping) of books of account or records' which the bankrupt act calls for. They were no more a part of such books or records than if the bankrupt had noted his indebtedness to his family on the back of a visiting card and kept it in his pocketbook, or had written it on the fly leaf of a book in his library.''

(72) Tr. p. 50.

(73) Tr. p. 161.

A mysterious "Mr. Bass" is shown by the defendant's evidence to have made the *expense entries;* but he was *not produced upon the trial* for cross-examination nor sworn to establish the accuracy of the "cash book", therefore we have as to that the self-serving assertions of this trustee alone, which can hardly be said to be sufficient to establish affirmatively this highly "abominable record".

Upon an accounting the burden is upon the person having charge of the bookkeeper to produce him.

Sandford v. Embry, 151 Fed. 978.

(d) His "cash book" a Chinese puzzle.

It is like what constituted one of the earliest puzzles in metaphysics, the apparent paradox of identity with diversity. This book offered the Court bears every evidence of having been confused purposely; it bears every earmark of fraud, insertion, obliteration, alteration, and padding.

And if it is the same book that Mr. Herrick says he examined some weeks before the trial it must have even strained his loyalty to his employer to have overlooked all these most apparent earmarks of fraud.

But this book was *not* the same that Herrick examined three weeks before the trial, for he testifies:

> "The 'report' is made up from these slips and books exactly as I originally found them."[74]
>
> "I found a salary expense account in the book (Defts. Ex. C) just introduced in evidence. *Neither the names nor purported names of clerks are*

(74) Tr. p. 135.

> *therein given nor the amounts of salaries paid.* The record is merely that all disbursements are made—specified as of one character or another."[75]

But *Isaacs* testifies, referring to these entries in this "cash book":

> "Part of them were made before I got there and then when I arrived, *the names of the various employees were entered there,* and Mr. Seynei told me how much to pay to these various employees; he entered them in the book—stood alongside of me at the desk Saturday night when we paid off the help, Mrs. so-and-so so much, and that money was handed to that lady—*then he would enter her name and the amount.*"[76]

Mr. Seynei testifies he "never saw any books kept by the defendant on that sale".[77] Isaacs on the stand must have been in a state of mental stampede, for his own witness Herrick thus betrays his false "cash book" and proves conclusively that the entries *now* appearing therein were either written in and manufactured *after* its examination by Herrick—*or else is a different book entirely.* The present book (Defts. Ex. C) in evidence before your Honors *has* "the names or purported names of clerks therein given and the amounts of salaries paid"; items which Mr. Herrick even in his excessive zeal was totally unable to find at the time of his personal examination of it.

To quote the words of Judge Van Fleet in regard to this same defendant relating to his manufacture of

(75) Tr. p. 133.
(76) Tr. p. 147.
(77) Tr. p. 50.

evidence pertaining to a portion of this same trust fund:

> "The testimony in behalf of defendant here of a contradictory—and I might add a more sinister—character is such as not only largely to destroy the value of the evidence of the defendant himself but of several of his witnesses. I am not at all satisfied in my mind that these purported books of account that have been put in before the Master and again on this hearing have not been sophisticated from start to finish. I have the evidence before me of the defendant himself that one book, 'Exhibit D', that he relied upon as an exhibit before the Master as a book made in the due and ordinary course of the transactions as they occurred was purely manufactured—made up for the occasion—after the suit was commenced and in the face of the litigation itself."[78]

(c) This "cash book" unsupported and evidently adjusted for the purposes of this accounting—"after the suit was commenced and in the face of the litigation itself".

The daily cash sale entries do not correspond accurately with the daily slips or the daily bank deposits—not in one single instance. Even this trustee's well known and skilled juggling with figures was not able to make all these figures correspond as they should, for *prima facie* they appear to have been all written in at one sitting.

In short his "cash book" stands unsupported. It is not a record of the individual sales but contains a few totals made in lead pencil by Isaacs and which were easily adjustable, and the fact of their including

(78) Herein p. 139.

the spurious sales slips and excluding the monies paid out of the cash drawer, shows that they have been adjusted and are false and untrue; and the fact that the expense items are sophisticated and evidently manufactured and padded shows that they are in the words of the bill "false and untrue".

It was the duty of this trustee to keep proper books of account of the trust fund of the complainants' merchandise in his hands and his failure to do so, or I might say his even more sinister methods, is a strong presumption against him; and the trial Court erred in not so holding and deciding.

I respectfully request a personal examination by your Honors of this Defendant's Exhibit C, as the book speaks for itself, and is before this Court.

In this regard I refer to Assignment of Error XXXV (Tr. p. 204) as its reception in evidence and acceptance by the trial Court as a proper book of acount by a trustee was manifest error. In the absence of proper books of account this trustee should have been charged with the full value of the trust fund; and the trial Court erred in not so charging him as cited in Assignment of Error XXXVI (Tr. p. 205) and Assignment VI (Tr. p. 131).

(2) Isaacs' Expense Account.

(a) Its items are out of all proportion to the receipts.

The expense items represented to the complainants as having been paid out by Isaacs as shown by his statement set forth in the bill for their three weeks'

retail sale *are out of all proportion to the receipts,* and being for the most part unsubstantiated by original vouchers, are open to the broadest scrutiny and criticism.

On this sale of 19 days the total sales were purported to be $17,807 and the total expenses were $7531.

In other words, these complainants only received $10,276 net, *at retail,* for merchandise inventoried at $21,301 at Bridge's wholesale cost prices, being about 53% less than the original cost; or some $6000 *less than they paid for it in bulk at wholesale* a few weeks prior; and the best of the merchandise was sold at this retail sale.

(b) Isaacs corroborates Seynei as to the actual labor expenses being far less than his purported $1655.

Mr. Seynei testified the amount of this trustee's expense account was exaggerated and exorbitant compared with his own sale of H. C. Seynei Co., and that no such amount was paid out to the best of his knowledge.

> "The first day of that insurance sale there were thirty or thirty-five clerks employed. Towards the end of the sale these were reduced to about fifteen in all; ten men and five ladies. The average amount paid the clerks was $15 and up a week for the men, and $9 to $12 for the ladies. The defendant's statement to the complainants (Plffs. Ex. 2 Q') charging up some $1655, or $551 a week clerk hire against them looks to me as an exorbitant amount for clerk hire. To the best of my knowledge there could not have been more than $800 paid out for clerk hire; there was only one or two days they had extra help and they

were not expensive help; they did not require expensive help for that sale."[79]

So this statement that not more than $800 could have been paid out for clerk hire, averaging $266 a week, is absolutely corroborated by Isaacs' own statement on the stand, that *the labor the first week was $270.*[80]

(c) The Seynei books expose the falsity of Isaacs' expense account.

These Seynei books are in evidence and were kept by a professional bookkeeper; they are elaborate and show this trustee's different method of careful bookkeeping for himself and, to say the least, the loose bookkeeping for his principals. The Seynei books show that the expense for the Seynei sale for *seven (7)* weeks (Complts. Ex. 18) was only $3133,[81] or $447 per week, and it was conducted at the same location with the same rental per month and same lighting and clerk hire, as against $3973, which does not include commissions of $3560, or $1324 per week running expenses at the *three weeks'* sale of this trustee for the complainants. In other words, when conducting a sale for himself under exactly the same conditions Isaacs' running expenses were $877 less per week than when conducting the sale for these complainants.

(d) Isaacs' own testimony shows his expense account must be padded.

The clerk hire for Isaacs' firm of Seynei & Co. was $1264 for *seven (7)* weeks, or $180 per week, as against

(79) Tr. pp. 51-52.
(80) Tr. p. 147.
(81) Tr. p. 227.

Isaacs' purported clerk hire of $1655.21 against the complainants for three weeks, or $551 per week. Isaacs testifies his labor at the insurance retail sale was $270.11 for the *first* week, which, according to his purported total in his cash book of $1655.21, would make the second and third weeks average $692 per week, but as the number of clerks were reduced this shows that Isaacs must have padded the amount of the clerk hire or the labor entries the second and third weeks, and thus the non-production of Mr. Bass becomes even more significant.

Isaacs testifies the running expense at his sale for these companies averaged 23% and a fraction; but at the same time swore that at a sale like the Seynei sale the running expense should be 25% to 26%—sometimes 30%; thus out of his own mouth the insurance sale expense should have been lower instead of 30% higher per week than the sale for his own partnership.[82]

This impeccable trustee was careful upon his sale for these companies to take no receipts at all from the clerks for these amounts on that three weeks' retail sale but was very diligent to take receipts from them on his own thereafter for H. C. Seynei & Co.[83]

(e) He fails to produce his bookkeeper.

Isaacs was very careful upon the trial not to produce the mysterious "Mr. Bass" to substantiate his "cash book" entries (lead pencil) of these expenses, although

(82) Tr. p. 154.

(83) Tr. pp. 52-77.

he claimed them to have been made by "Mr. Bass". The purported vouchers for these expense items were copies, not originals, without the originals being accounted for, and Herrick's "report" shows that these only "appear to represent actual and proper payments"[84] and do not always correspond with the items in his statement to the companies or are missing entirely. Herrick testifies "the expense items are only partially supported by vouchers."[85] The voucher, in fact, for the rent shows the rent was not paid at all by Isaacs but "by the adjusters", a discrepancy alone of $920.[86]

It is incredible to believe that any such amounts as shown by Isaacs' expense account were ever actually disbursed, being so greatly in excess of the amounts actually paid out by Isaacs in his own business under similar conditions; yet, the District Court held this trustee to have successfully established every item in this account as correct prior to his clandestine sale in bulk to himself of the balance of the complainants' merchandise.

We claim the trial Court erred in its decision (as cited in our Assignments of Errors XXXVII and XXXVIII)[87] in holding that every item in this expense account was satisfactory and fully established, and also erred in accepting copies of vouchers without the originals being accounted for, and also in permitting

(84) Tr. p. 241.
(85) Tr. p. 133.
(86) Tr. p. 133.
(87) Tr. pp. 205-6.

the paid expert to give an opinion (based upon the self-serving assertions of Isaacs by word of mouth before the trial) as to whether the defendant had made a satisfactory accounting. That was for the Court to determine.

(3) His Bank Statement—Complainants' Exhibit D.

(a) This trustee commingled the trust fund with his own personal funds. His own and his sister-in-law's testimony proves the complainants' monies were not all deposited in the Seattle National Bank but must have been concealed elsewhere.

Herrick's purported "report" claims that Isaacs only deposited in the Seattle National Bank during the period of the insurance sale at retail $19,744.26.[88]

The testimony of the auditor of the Seattle National Bank shows that this trustee actually deposited $20.744.26[89] during the period he claims to have taken in only $17,800 for the complainants.

Isaacs admitted on the stand to having commingled the trust fund with his own personal funds and to having deposited during the period of the complainants' retail sale his own personal check amounting to a thousand dollars and other

> "checks for merchandise sold *at different places on different sales*".[90]

Mrs. Benzoin who managed the North Yakima sale for Isaacs testifies she sent him at Seattle during this period nearly $7000 in checks from the North Yakima

(88) Tr. p. 248.
(89) Tr. p. 219.
(90) Tr. p. 156.

sale alone.[91] *Her testimony remains uncontradicted and unimpeached upon the record.*

Thus there was over $8000 in checks available for deposit.

(b) Isaacs' bank account shows a deficit.

Herrick claims that from the $17,807.92 purported cash *sales* only $15,978.72 was available for deposit.[92]

From the foregoing evidence it will be seen the amount of *checks* available for deposit was over $8000, thus making in all over $23,978.72 available for deposit, which is $3234.46 *more* than his deposits of $20,744.26 actually show; i. e. his bank account *shows a deficit of over $3234.46.* It must be remembered we have not taken into account the "checks for merchandise sold at different places on different sales" nor the depreciation of the cash sales, the amounts of which if known would no doubt increase this deficit many thousand dollars more.

To make perfectly clear the significance of his shortage, I will put it this way:

Isaacs' total doposits were	$20,744.26
The foregoing evidence shows the amount of his checks *known to be deposited,* to be	8,000.00
Leaving the amount actually deposited from the complainants' cash sales—only	$12,744.26

which is $3234.46 less than the amount ($15,978.72) claimed by Herrick to be available for deposit from the complainants' retail cash sales.

(91) Tr. p. 166.
(92) Tr. p. 250.

Thus I have demonstrated that Isaacs did not deposit all the monies available from the cash sales and his motive in confusing and commingling the trust fund was for the direct purpose of hiding monies from the cash sales and of concealing the exact and true amount taken in upon that sale, for the amount concealed was in reality far greater than $3234.46.

Herrick claims that from $17,807.92 purported cash sales only $15,978.72 was available for deposits, as Isaacs informed him orally out of Court that $2192.90, as part of the $3973.60 expense items, were paid by check, although he did not see these checks nor could he state that he had any basis for his conclusion to show that these items were paid by check save Isaacs' self-serving declarations in a conversation out of Court some weeks before the trial.[93]

The complainants claim that the amount available from cash sales for deposit was greatly in excess of $15,978.72 and that Isaacs concealed these excess returns, and that the expenses, $3973.60, were all paid out of the cash drawer, as it would be most natural to do as there always was a large amount of cash in the cash drawer available for incidental expenses, thus the real deficit would be greater still than the $3234.46 shortage apparent from Isaacs' depreciated returns from complainants' retail sale.

It may be called to the Court's attention also in passing that *these amounts paid for expenses out of the cash drawer were of course never banked*,[94] also

(93) Tr. p. 243.

(94) Tr. p. 52.

that they were not *included* in the *cash book entries* of the total daily sales.[95]

(c) Isaacs conceals checks available for deposit from his his own accountant.

Herrick testifies he did not examine Isaacs' bank books or check books and that these were not presented to him,[96] but for information he relied upon a statement and deposit slips purporting to be from the Seattle National Bank but which were excluded by the Court as being copies and not originals and not verified by the bank;[97] therefore his only knowledge of the number and amounts of checks deposited was from selected data and information furnished him out of Court by Isaacs which constituted the only basis for his conclusions.[98] The only checks produced by Isaacs were four checks from North Yakima drawn on the North Yakima Bank *and amounted to only $2850.* He concealed and made no mention of the balance of $4150 from the $7000 sent him in checks from North Yakima by Mrs. Benzoin; nor of the other "checks for merchandise sold at different places on different sales", which he admitted on the stand he deposited in the Seattle National Bank.

(d) Isaacs cornered.

It can readily be seen that if he had informed Herrick of all the checks actually deposited by him

(95) Tr. p. 141.
(96) Tr. p. 139.
(97) Tr. p. 157.
(98) Tr. pp. 142-243.

during this period, his bank account would have shown an embarrassing deficit of many thousand dollars and would have proven that Isaacs did actually conceal monies from the complainants' retail sale (presumably in his safe deposit box[99]) for checks must be deposited for collection.

But this wily trustee, hoping to cover up his fraudulent manipulation of the trust fund, concealed from Herrick the real amount of checks deposited (over $8000.00) and produced only these four cancelled North Yakima checks amounting to but $2850;—and thus the astute Herrick is able to create an *apparent excess* in his employer's bank account.

(e) His accountant Herrick claims an excess of $915.54 which he cannot account for from the data offered.

I have shown this excess claimed by Herrick is not based upon all the facts or all the evidence in the case but is a mere manipulative jugglery of figures under the eminent direction of "Mr. D. Isaacs".

Mr. Herrick in his purported report to bolster up his client's "abominable record" claims an excess of $915.54 in Isaacs' bank deposits over and above the four exclusive North Yakima checks of $2850 and the amount of $15,978.72 available for deposit from the cash sales, and which he admits he could not reasonably account for except again for this indefatigable method of the defendant for—private explanations—weeks before the trial that he made other deposits, and so commingled the trust fund with his personal

(99) Tr. p. 92.

cash. The evidence shows those other deposits were far in excess of $915.54. *Mr. Herrick dismisses this small(?) excess of $915 by saying it is of little importance.*[100]

We claim that any excess money in bank unaccounted for whether $915 or more shows clearly that this trustee received more money than he represented to these complainants to have received, or accounted for, and is of importance and is one of the reasons why this accounting was demanded.

We have proven this trustee's bank account in reality shows a deficit, and that he must have had another secret bank account, or else deposited currency of the complainants in his safe deposit box and which in some way was shipped to San Francisco leaving no trace behind or record in Seattle.

Although he had an account in the Seattle National Bank, and the use of Mr. Aronson's great safe next door, this impeccable trustee rented the day he opened his sale for these complainants a safe deposit box with an obscure private banker and visited it an average of three times a week during that sale at retail, and where he confessed to having deposited cash from this sale.[101]

Thus does Isaacs not only fail to account for his entire bank deposits but also for this money of the complainants hidden away in his private deposit box.

(100) Tr. p. 244.
(101) Tr. p. 92.

At every point we are met by this trustee with the greatest attempt at concealment and chicanery. There is nothing accurate, concise, or above-board. Nothing in his accounting proves up or checks up. Neither his sales slips, cash book or bank deposits verify the integrity of his purported total sales of $17,800 or show the true and correct amount of the retail sales. His whole effort is to make such a haze of his handling of the trust fund that the Court will not be able to penetrate it. This camouflage completely obscured the discernment of the lower Court.

(4) Isaacs' Sales Slips.

(a) This trustee fails utterly to establish their integrity.

This trustee, in an effort to substantiate his figures and totals, offered in evidence a selection of some ten thousand loose leaf sales slips purporting to be the actual slips for sales of the complainants' merchandise at their retail sale of 19 days.

In certain instances these slips are sophisticated and manufactured for this cause; and are incorrect not only as to the amount of sales and number of articles sold but directly impeach the amount of the cash sales. They are loose leaf and nothing to show those in evidence are all the same as of the time of sale three years prior to the trial.

(b) He withholds all evidence by which his sales slips can be checked up.

There is no way of checking them up; no salesmen's indexes or adding machine totals or cash register totals,

or original sales tags, all these means of checking them up having been either withheld or destroyed by the defendant, yet these were made daily.

Mr. Herrick testifies on the stand as follows:

"Mr. Olney. Q. You did not compare each separate sales slip?

A. There is nothing to compare it with.

Q. That is what I thought.

A. What could there be that they could be compared with, unless there was a complete record of the individual sales?

Q. There is no complete record, is there?

A. No, there is none.

Mr. Schlessinger. Except as appearing on the slips themselves?

A. Well, there is nothing appearing on the slips themselves except a showing of the sales that they are presumed to evidence.

Q. Did you also see the original adding machine totals of the slips? A. No.

Q. Or cash register totals?

A. No, nothing except what I have referred to.

Q. Then you saw no other records than these slips and these books? A. No.

Q. If any slips were missing, Mr. Herrick, they were not entered in the book, were they? You do not know how many slips were missing, do you?

A. No, I don't know whether any slips were missing or not.

Q. You simply made up your report from the slips that are here? A. Yes."[102]

And in regard to the salesmen's indexes he says:

"Q. It is the chief record to check the sales record?

A. Yes. It is the means of carrying out the check of individual sales to the complete recapitulation.

(102) Tr. p. 136.

Q. It also checks up the sales slips, does it not?
A. Yes.
Q. Your report, I believe, does not include these indexes? A. No.
Q. There were none such furnished you?
A. No.
Q. I believe you also stated you did not have furnished you any of the original adding machine totals or cash register totals of these sales by which they could be checked up? A. No."[103]

Thus the witness, Herrick, in whose "report" the defendant places his sole reliance upon his accounting, says he has no way of proving if all of the sales slips of the retail sale have been produced as he has nothing to check them up with, and that some may be missing, and that the salesmen's indexes originally accompanying them are the chief means of check and audit upon their accuracy, and these have not been furnished him by the defendant, and that therefore the selection of sales slips produced by Isaacs are an incomplete record; and that he cannot check them up individually with the "cash book" (Defts. Ex. D); and that his "report" is only correct upon the assumption that all the sales slips were presented to him,[104] and upon the integrity of those produced.[105]

The witnesses, the salesmen, said that during the rush hours often no sales slips were made out at all on the insurance retail sale, there wasn't time.[106]

(103) Tr. p. 138.
(104) Tr. p. 242.
(105) Tr. p. 241.
(106) Tr. p. 50.

Mr. Jeremy explained how the salesmen's indexes made out each day by salesmen indicating their total amount of sales, and the total number of sales, checked up the cashier or manager as well as the sales slips.

> "Mr. Olney. Q. Now, Mr. Jeremy, I want you to explain to the Court how an agent or cashier by losing or destroying these sales indexes which have been referred to on this trial, could profit. Just take this book and take this package of sales slips at random and explain to the Court how that could be done.
>
> A. These sales slips were furnished to us the first day of our sale. On that day we were given a sales book. The clerk's number was on the left and the date on the right. A carbon was inside of the two; both went up to the office together; one went to the customer and the other remained in the office with the cashier. The indexes showing the total number of sales were totaled up for the day by the salesman. If 17 sales were made we totaled up on number 17 in the index. On the next day, the second day, we got a new book; and on the next or third day we got the old book back again we had on the first day, with a new index which indicated the number of sales you sold on the first day whether it was 75 or 13 or 24. We never went by the book; we simply went by the index. If there were 6 or 7 sales slips missing from the book, we had nothing to show; we simply had the index for the receipt."[107]

Thus by destroying these indexes a manager or cashier could destroy or lower the amount of any number of sales slips, and so conceal the actual amount of cash, and there would be no way of checking them, *or him*, up.

(107) Tr. pp. 162-163.

Why should Isaacs preserve 10,000 sales slips and not one single adding machine total, or a single index, nor cash register total, nor original sales *tag,* by which his collection of slips could be checked up? This attempt at concealment is only too apparent, and shows sophistication from start to finish; and the trial Court erred in not so holding and deciding.

Isaacs' daughter, Mrs. Cohn, who at the time of the sale was Miss Isaacs, said she had not seen the sales slips since the time of sale three years previously,[108] therefore it could not be possible for her to know if the sales slips in evidence were the same as those on hand at the time of the sale, or whether the unproduced salesmen's indexes would check up the sales slips actually produced in evidence now. The defendant has carefully seen to that. He has withheld or made away with all proof by which alone the accuracy of the sales slips selected by him as serving his purpose in evidence could be determined. His daughter swears she did not check up the sales slips in her possession three years before with the cash book entries, and *did not know* whether the total amount of sales slips at that time corresponded with the cash book entries or not.[109]

(c) Isaacs fails to account for all the complainants' merchandise. His sales slips are short.

Even these loose leaf sales slips selected by the defendant for production in Court fall short in the number of articles sold. The sales slips for about one-twelfth

(108) Tr. p. 161.
(109) Tr. p. 161.

(1/12) of the articles sold are missing by the defendants' own proof. They fall short over sixteen hundred (1600) articles which are unaccounted for. His own figures not only impeach the integrity of his sales slips but show that his evidence was false and his figures manufactured, and that they do not correctly represent the number of articles actually on the sales slips, or the number actually sold, and thus exposes how he cheated these insurance companies out of thousands of dollars.

(d) He attempts deception through false figures.

A comparison of the articles on the sales slips, as computed by Isaacs *himself* (although he had two hired experts work on these slips) and by Klink, Bean & Co. show that Isaacs swore falsely when he testified that *more articles were on the sales slips and were sold than the sales slips actually show;*

For example:

No. of articles computed by Isaacs as sold as per sales slips for these companies on his sale for them.[110]		No. of articles computed by Klink, Bean & Co. from the same sales slips as having been sold for these companies.[111]	
Suits	470	Suits	419
Overcoats	173	Overcoats	146
Pants	895	Pants	801
	1538		1366

In these three cases alone he claims his sales slips show one hundred seventy-two (172) articles more sold than they do.

(110) Tr. pp. 148-151.

(111) Herein, Appendix.

The same is true in nearly every instance throughout the entire sales slips, i. e., that Isaacs claims the sales slips show more articles sold than the sales slips selected by him for production in Court corroborate.

In a further effort to deceive the Court he becomes enmeshed in his own figures. On page 149 of the transcript he testifies that out of a total of 1577 suits his sales slips show that 470 suits were sold (Klink, Bean & Co. give 419 suits as sold), and that 1112 suits were left at the tail end of the complainants' sale—in other words there were

in the First Inventory	1577 Suits
in the Second Inventory	1112 Suits
Making	465 Suits Sold

He says, however, that his sales slips show 470 suits as sold, which would indicate he sold five more than he received; but either his enthusiasm or his evil intent gets the better of his arithmetic for on the second page following he raises the number from five to *fifty-six* (56) and thus goes himself fifty-one better;—all indicating with what lightning rapidity our worthy trustee calculates and manipulates figures for his own benefit! Like results of his genius appear constantly throughout the record, but I will not further tax the patience of the Court.

(e) Proof of the shortage in his sales slips.

A comparison of the number of articles sold as per these loose leaf sales slips, and the number of articles

to be accounted for, as per the difference in the first inventory taken immediately before the sale and the second inventory taken immediately after, the difference showing the correct number sold, shows that the sales slips in evidence fall short over sixteen hundred articles (1600), *or in other words that 1600 articles were not included in Isaacs' cash sales of $17,800 and remain unaccounted for.*

For example:

Number of articles sold as per sales slips.		Number of articles to be accounted for as per difference between 1st and 2nd inventories.	
Suits	419	Suits	468
Pants	801	Pants	959
Hats	658	Hats	1005

The above shows that this trustee's sales slips in evidence fall short in the suits 49, which at $10 a suit, cost prices, would be $490 (and there were suits as high as $20 in the first inventory but the high priced suits are mostly missing from the second inventory).

In the pants 158 pair are missing, which at $5 a pair would be $790.

In the hats there are 347 missing, which at $2 a hat, is $694, for it must be remembered that the evidence shows this Bridge stock to have been a *staple* stock throughout.

In these three cases alone we find that $1,974 worth of merchandise is unaccounted for, and that thus this trustee directly cheated these complainants out of that amount,—*and there are still over a thousand articles*

more missing which should be accounted for and which would run his shortage into thousands of dollars.

Isaacs acknowledges in his testimony that his sales slips for the pants fell short 64,[112] (according to the accountants, Klink, Bean & Co. in reality this shortage was 158)[113] also that the shirts, underwear, mittens, gloves, socks, mufflers and handkerchiefs are short,[112] and he fails to give any reasonable explanation, as also for the other shortages as shown on pages 116-117.

The trial Court entirely overlooked the significance of the foregoing admissions by Isaacs, and erred in holding and concluding that

> "if we add to the last inventory (2nd.) the goods sold, as disclosed by the sales slips, we will have approximately the goods shown by the first inventory,"

for the fact is the goods have *not* "all been accounted for";—we would at least be short *sixteen hundred and twenty-five* (1625) articles, which is *one-twelfth* (1/12) of the total number of articles sold, and whose value as I have just shown is thousands of dollars.

The first inventory was stipulated by all parties to be correct, therefore, these shortages as shown by both Isaacs' and Klink, Bean & Co.'s figures *can be accounted for in only two ways*—either

> the sales slips for these articles were *not included*, i. e., that they were *destroyed* or *withheld*, and did

(112) Tr. p. 151.
(113) Herein p. 113.

not enter into the computation of these *purported* $17,800 cash sales—

or else

the second inventory was *depreciated* to that extent, i. e., *these articles were left out entirely.*

In either case these complainants were directly defrauded by this defendant.

The second inventory was made by Isaacs at the close of the retail sale for his own percentage bid of 45% (lowered from 47%).

Main testified that it was his understanding that the second inventory *was taken on the same basis as the first;* that everything was included and that there was no depreciation allowed for any damaged merchandise, and that the 45% bid included the damaged merchandise as well.[115]

Mason testified that the merchandise of no value was all on one or two tables, that its sum total was only from $300 to $700, *and that it was all entered in the first inventory.*[116]

Mr. Seynei[117] and Mr. Jeremy[118] testified that the merchandise badly damaged was all on one or two tables and did not exceed $500; that practically all the damaged merchandise was marked and put on sale.

Mr. Meyer testified that even the furnishings, shirts, collars and underwear, that were smoked and smelled

(115) Tr. p. 122.
(116) Tr. p. 118.
(117) Tr. p. 45.
(118) Tr. p. 79.

badly *were marked and sold above cost.*[119] The evidence was all to the effect that the damaged merchandise was reconditioned and sold.

The first inventory shows that only *216* articles were a total loss, and that these at cost were valued about $500.[120]

The first inventory was made out under Mason, the adjuster for the assured to whose interest it was that the loss should be estimated and exaggerated as much as possible, as this first inventory was a basis for estimating the loss; yet Mason can only find 216 articles a total loss as against the 1625 articles unaccounted for by Isaacs.

For example:

The first inventory taken by Mason as a basis for estimating the loss, reports the following:	The shortage as shown by a comparison of Isaacs' sales slips and the difference between the 1st and 2nd inventories is the following articles missing and unaccounted for:
No suits marked damaged.	49 Suits
33 prs. pants marked total loss	158 prs. pants
48 hats badly damaged	347 Hats
No gloves or mittens marked damaged. (These were kept in cases and boxes in the Annex and could not possibly have been reached by anything.)	127 Gloves and mittens
37 Sweaters total loss	
130 Shirts and underwear total loss	160 Shirts and underwear
16 Union suits total loss	

(119) Tr. p. 90.
(120) Tr. p. 233.

	136 prs. socks
	50 Mackinaw and oil coats
	92 Overalls and jumpers
	118 Neckwear
	155 Handkerchiefs and mufflers
	8 Umbrellas
	24 Aprons
	63 Arm bands and garters
	8 Belts
	130 Miscellaneous
Articles total loss.....216	1625 Total
" badly damaged.... 48	This total *includes* the spurious sales slips manufactured by Isaacs. If these spurious sales slips were excluded, the number of articles unaccounted for would be greatly increased; for instance 100 suits, 52 pants should be added to the above shortages.
Total 264	
Total value as per 1st inventory .....$558.20[120]	

From the foregoing evidence it will be seen that the number of articles totally damaged was infinitesimal; that practically all the damaged merchandise was saleable, had a value, and was actually sold; for Isaacs also testified the damaged underwear was sold at various prices. Therefore these 1625 articles, as shown to be missing and unaccounted for, must have been sold and the sales slips destroyed or withheld and did not enter into the aggregate of the $17,800 purported cash sales.

(f) Isaacs introduces spurious sales slips.

From a further examination of these sales slips Klink, Bean & Co. report over one hundred sales slips as not bearing dates relative to the sale and representing alone

as sold 100 suits, 17 overcoats, 52 pants.[120a] In fact many more slips have no dates, no clerk numbers, and are not correct serially, *and have nothing to identify them as belonging to this sale.* This shows conclusively that these sales slips have been padded and many manufactured, and which it would even tax Herrick's "purported purports" to whitewash. It is quite evident these slips were not made out during the 19 days of the insurance retail sale, and therefore cannot be included in the slips for that sale. It is only too apparent these spurious "sales slips" produced in Court by this trustee are an eleventh hour attempt to bolster up his sales slips by any means whatever, trusting to luck that among 10,000 sales slips, they would not be discovered. The fact that these purported sales slips should have all been preserved so carefully, but not one single adding machine total or cash register total of them, or one single solitary salesmen's index by which alone their integrity could be ascertained, is a strong presumption in equity against this trustee as their producer.

As for these hundred or two undated sales slips unconnected with the sale, it is interesting that the total amount of these spurious sales slips aggregates some hundreds of dollars, and should not be included in the total amount with the other sales slips; thereby proving conclusively Herrick's purported total of $17,800 of these sales slips to be incorrect and based on false data; and also proving conclusively that Isaacs' figures

(120a) Herein, Appendix.

and penciled entries in his so-called "cash book" are sophisticated.

The main thing, however, out of all this haze produced by this trustee to hide his own misappropriation from these complainants, is that sales slips were not only manufactured and depreciated, but also that many are missing from the selection furnished the Court for evidence, and that his representation to the complainants in his statement to them of only $17,800, realized from their merchandise at retail, does not represent the true amount of sales.

(g) Complainants' various impeachments of the defendant's sales slips.

By the review of all the foregoing evidence your Honors will have observed that your complainants have impeached their trustee's sales slips in the following various ways:

(1) His total amount of sales ($17,800) as shown by his sales slips was 20% below the original Bridge wholesale cost prices as given in the first inventory for this same merchandise; while the evidence of *five* of his own salesmen, and of Mr. Bridge and Mr. Bailey, showed that the merchandise on the insurance retail sale was marked and sold on an average of 20% *above* the same inventory cost prices.

Therefore if Isaacs' sales slips only aggregate $17,800, which is 20% *below* the original Bridge cost, they could not possibly be correct, or all be in evidence, for upon that basis there would be a difference in the selling estimates of 40%, which would indicate the mer-

chandise was sold for 40% less than these *seven* disinterested witnesses have sworn to without contradiction from the defendant. Such wide variance refuses belief.

(2) The evidence of Messrs. Mason, Main, Seynei and Jeremy, was that such a stock at a fire sale should bring 20% to 50% more than at an ordinary sale.

(3) Mr. Mason testified that this stock should have sold at inventory prices; that the best would sell first and should bring way above inventory prices.

(4) The mute evidence of the Seynei books is that after the best of this Bridge merchandise had been sold at the insurance retail sale, the balance of the same stock sold at the sale for Isaacs' partnership of H. C. Seynei & Co., brought *10% above* the same inventory cost.

(5) The evidence of Mr. Jeremy, Mr. Seynei, Mr. Bridge, and of Mr. Bailey as to admissions of the defendant to them before the close of the insurance retail sale, was, that Isaacs *before that sale closed* told them and others that he had already *"made good his guarantee ($18,100), his commissions, and all expenses, and was on velvet."*

(6) The evidence of the Seattle National Bank by its auditor, as a witness, *shows over $4,000 more money deposited* by this trustee during his sale at retail for the complainants *than the amount purported by his selected sales slips* offered in Court, less clerk hire; not to mention sums in currency probably deposited in

his private safe deposit box with Wm. D. Perkins & Co., private bankers.

(7) The evidence is that the sales entries in the "cash book" made by Isaacs are not a complete record of all the sales.

(8) The evidence of Mr. Seynei was that during the rush of the first few days and whenever they were very busy, *sales slips were not always made out as there was no time.*

(9) The evidence of the defendants' own witness, Herrick, was that these slips were not a complete record of all the sales.

(10) The evidence shows the original cash register totals, the adding machine totals, and the salesmen's indexes by which alone these slips could be checked up, to be missing, and their absence and non-production not satisfactorily accounted for by the defendant. His witness, Herrick, testified that these salesmen's indexes are the chief check on sales slips. The evidence was that all these existed at the time of the insurance retail sale.

(11) The fact that the sales slips themselves show that many articles (1625) remain unaccounted for, including 49 suits, 158 pairs of pants, 347 hats, etc., and that many sales slips are sophisticated is corroborated by Isaacs' own evidence and by Messrs. Klink, Bean & Co.

(12) The fact, that never throughout the entire history of the selling at retail of this whole stock does its selling value fall below its Bridge first inventory

values, except in Isaacs' purported returns upon this retail insurance sale for these complainants, for which sale these ostensibly are the sales slips.

Yet, despite all this mass of facts, figures, and direct, concise evidence by the complainants as against Isaacs' lone, self-serving assertions, the District Court held that these sales slips had not been impeached! (Tr. p. 40.) *Such decision and holding seems incredible and we cite it here and in our Assignments of Error XXXII* (Tr. p. 189) *as error of the most pronounced type, and respectfully request this Court to reverse it and that the lower Court's decision be revoked, as it was not based upon the correct facts or the actual data in evidence, but upon this trustee's own (false) statements and the assumptions of his hired expert based upon them.*

(5) Herrick's "Purported" Report.

(a) This "report" was prepared upon a wrong hypothesis and false basis, upon insufficient data, and upon excluded data which the Court refused to accept or receive in evidence.

Its author testifies "it is correct upon the basis upon which it is prepared".

Perhaps psychologically the most interesting of all the self-serving data furnished the Court by this trustee is the "purported" "report" of Herrick, the accountant, employed by defendant's counsel, who appears not only as an expert on figures but also upon honesty and integrity, who seemingly dismisses as of no importance the first half of the good old maxim, "Liars may figure but figures don't lie."

This "report" is one of the rarest bits of humor found in the law; certainly unequaled since the time of Charles Dickens and the immortal Pecksniff; and though it should never have been received in evidence under any principle of law or equity, it is fortunate that the lower Court has preserved it for your Honors' delectation.

Mr. Herrick naively clears his skirts by announcing at the start, that the report is only "correct upon the basis upon which it is prepared,"[121] i. e., upon the data furnished him ex parte by Isaacs, and then proceeds to qualify by saying that he does not know whether all the data was furnished him, and in fact that it was not all furnished him; and that in fact these omissions and commissions were explained to him by oral conversations with his employer some weeks before the trial. Thereupon he proceeds to give his employer a clean bill of health, and states as his personal opinion that Isaacs' figures "unless they are false"[122] are correct; and thus proved his employer's integrity to the satisfaction of the lower Court. Almost the entire "report" is an opinion or a conclusion of this accountant, that the records "appear" and "purport" to be so and so, and "unless they are false" they do this and that. The records, of course, are "false." At no time in making up his conclusions does he speak of facts but always of suppositions; and we respectfully refer the Court to our Assignments of Error Nos. XXXIII, and XXXIV (Tr. pp. 192-204) as to the trial

(121) Tr. p. 129.
(122) Tr. p. 137.

Court's unquestioning acceptance of its figures and conclusions as to the defendants' own honesty and integrity based upon self-serving data selected by the defendant, himself, weeks before the trial, and placed ex parte in his witness' hands, part of which was not accepted in evidence by the Court. Such opinion was not receivable in evidence, unless based upon a thorough review of *all* the evidence in the case, and not upon secret ex parte statements by the defendant to the witness alone respecting his own honesty and integrity, and to serve his own purse, regarding his dealings with the complainants.

(b) Herrick fails to establish the integrity of the sales slips.

This witness, Herrick, was largely called upon to testify in regard to some ten thousand loose leaf sales slips selected by the defendant, that is, called upon to testify *as to the amounts only,* and *not* the *number of articles;*[123] and upon cross-examination he confessed that they (the sales slips) only "appeared correct," and *that many might be missing, as he had no means of determining whether all had been furnished him as he had not been furnished by Isaacs with any means of checking up these slips;*[124] and that the accuracy of the individual sales slips was doubtful. He testified that no salesmen's indexes, cash register totals, or adding machine totals, of these slips, whereby the sales slips and purported cash entries could be checked up, had been furnished him by Isaacs, although he said these

(123) Tr. p. 140.
(124) Tr. pp. 136-8.

are always included in the usual record of each day's transactions, and that the indexes are the chief record of checking sales slips.

"Mr. Olney. Q. Mr. Herrick, if it should appear that upon this sale for which these sales slips have been produced here there were indexes made by each clerk showing the amount of each individual sales slip, and the total cash sales, which was turned in each night to this defendant, should not these indexes be produced here and accompany these sales slips in order to make a complete record?

A. Yes. These books contain, usually, 50 of these slips with carbons and there is also in the book a sheet having lines and numbered spaces from 1 to 50, for the purpose of taking an entry of the total of each individual slip, and upon the conclusion of the day or the completion of the use of the slips, he figures his total and it becomes a record that enters into the entire record constituting an audit of the transactions of the day.

The Court. Totaled up by the salesmen?

A. It is totaled by the salesmen and returned first to the proper office and in an organized institution becomes a part of the records of the business.

Q. These sales slips in the book are removable?

A. Yes.

Q. This index in the book is returned at the close of the day to the cashier?

A. Yes, that is the proper practice.

Q. And that is the chief record to check the sales record?

A. Yes, it is the means of carrying on the check of the individual sales to the complete recapitulation.

Q. It also checks up the sales slips, does it not?

A. Yes.

Q. Your report, I believe, does not include these indexes?

A. No.

Q. There were none such furnished you?
A. No.
Q. I believe you also stated you did not have furnished you any of the original adding machine totals or cash register totals of these sales slips by which they could be checked up?
A. No.
Q. You did not *compare each separate sales slip?*
A. There is *nothing to compare it with.*
Q. That is what I thought.
A. *What could there be that they could be compared with, unless there was a complete record of the individual sales?*
Q. There *is no complete record is there?*
A. *No, there is none.*"

Thus Herrick could not check up the individual sales, not even with the cash book; nor do each day's totals agree accurately nor the finals either. This will be seen by referring to page 246 of the transcript.

(c) Spurious sales slips included in Herrick's "report".

It is quite evident that the spurious sales slips detected by Klink, Bean & Co. were not noted by Herrick and were included in the total amount given by him, or else being noted were included upon Isaacs' assurance by word of mouth that they were bona fide; hence Herrick's purported sales slips total of $17,771.59 is padded to the extent of these spurious slips, if not more, and is short the amount of the missing sales slips which were not furnished him; and which Mr. Seynei and Isaacs himself both testified to the Court were missing (i. e., often not made out at all in the rush hours, and by Isaacs' evidence that "the *sales slips*

are short'') and which are proved missing by the computation of Klink, Bean & Co.

Further, it is also evident that his segregation under various days and dates of the hundred or more *undated* sales slips was purely arbitrary—or else based upon *''information afforded us by Mr. D. Isaacs,''* that those particular articles were sold several years previous on that particular day and date.

It must be remembered that Mr. Herrick was *not requested* by his employer to compute the *number of articles on the slips* and compare them with the difference in the inventories, whereby he would have quickly discovered if any slips were missing. From Klink, Bean & Co.'s examination of the selection of sales slips produced in Court, it shows that many articles are missing, as for example—forty-nine (49) suits are missing; one hundred and fifty-eight (158) pairs of pants are missing; also hats, underwear, etc., and it is the purpose of this equity suit to ascertain not only how many sales slips are missing, but also the depreciation and authenticity of those produced; for the evidence of seven witnesses was to the effect that the cash sales were greatly in excess of the amount represented by this trustee to have been taken in by him for the complainants.

(d) Herrick fails to establish the integrity of the "cash book".

Now, taking up this trustee's so-called ''cash book,'' the indefatigable Mr. Herrick assures us that it

"appears"[125] correct in the same breath that he assures us, that he had no way of determining if it represents all the cash taken in, and that inasmuch as it was not a record of the cash not put in the cash drawer and of the cash taken out of the cash drawer during the day, it was "not a complete record." He stated he did not know how much of the complainants' money was not put in the drawer (evidently Isaacs did not confide this to him "by word of mouth") but hastens to glibly add that $1,654 was taken out.[126] Herrick testifies this "cash book" *was not a record of the individual sales*,[127] and that the entries were made in pencil and that he "presumes" they were thus made at the time of the sale. It is not only the complainants' "presumption" but their affirmation, that these entries were entered and altered to meet the selection of sales slips offered the Court, as is Isaacs' custom. To assure us from such a maze of "purports," "presumes," and "appears," and "corrects unless they are false" that the cash book entries correspond with the sales slips is like assuring us that the pot is as *white* as the kettle.

This witness, Herrick, speaks truest when he admits the so-called "cash book" is not properly a cash book at all,

> "*This book is mixed up with a whole lot of other accounts.*[128] *It is simply an ordinary book that exhibits a simple, primitive, crude record of sales, and of disbursements, and of nothing else. It is*

(125) Tr. p. 131.
(126) Tr. p. 241.
(127) Tr. pp. 132-136
(128) Tr. p. 137.

pencil writing.[129] *The record is a very abnominable accounting.''*[130]

and not a proper book of account for a trustee to keep towards his beneficiary of the trust fund. All of which of course is indefensible and inexcusable with regard to any trustee, but particularly so in the case of the well known keenness and clever business methods of this defendant and his jugglery of figures in business transactions over a long period of years. With such cool-headed, calculating type of man there is no such thing as ''a hurry up proposition,'' as is best shown by the elaborate books of account, in evidence, ordered by this trustee to be kept in his own personal firm's handling of the balance of the trust fund after the clandestine sale in bulk to himself.

(e) Herrick's inferences beyond the facts.

Herrick's ''report'' consists mostly of five so-called ''statements,'' which are all opinions based purely upon the ''assumption of the integrity of the data furnished us,'' or ''upon information afforded us by Mr. D. Isaacs,'' and that ''unless they are false, they are correct.'' At no time at vital points are the assumptions of this accountant based on facts, or upon any record at the trial save the self-serving selected data furnished him weeks before the trial ''by Mr. D. Isaacs.'' *Nowhere or at any time is there a single premise or assumption or declaration based upon the whole record in the cause.*

(129) Tr. p. 134.
(130) Tr. p. 141.

"Statement A," being an assumption of receipts and disbursements exhibits the total sales of $17,807.92 which is only correct "upon the basis upon which it is prepared," and "upon the basis of the accuracy and integrity of the entries ("cash book") of daily sales showing *therein.*"[131] This witness says the vouchers "appear" to represent actual payments, but it will be observed the amounts do not correspond, and many including the labor items are missing outright as testified to by him. The "vouchers" are all copies and unverified, and the absence of the originals unaccounted for, and the depositions of those by whom they are purported to have been made were not taken or sought by this defendant. The rent voucher itself[132] directly shows a debit against the defendant of $920, as it states that the rent "was paid by the adjusters."

Says this loyal witness—"These payments (labor items) are stated to have been made in coin"[133] (again the indefatigable "Mr. D. Isaacs"). Is it not equally as probable that such small amounts of expense as "$6.50," "$4.75," "$10.00," "$28.09," "$30.00,"[134] etc., set forth in the "cash book" were also paid "in coin" out of the drawer!

In "Statement" B, recapitulation of sales as per cash book, etc., the witness again enthusiastically reaches the opinion, that "based upon the assumption that all the sales slips have been presented to us"[135] and

(131) Tr. p. 241.
(132) Tr. p. 133.
(133) Tr. p. 241.
(134) Tr. p. 250.
(135) Tr. p. 242.

"the indications of these entries ("cash book"), unless they are false,"[136] they approximately correspond. Here again it is interesting to note, that *although the daily totals do not correspond in one single instance yet the aggregate amounts apparently do;*[137] the little discrepancy of $8.01 being a mere bagatelle, as it would have been too letter proof to have had such a "crude record" exact.

It is also interesting to note that the loyal and ingenuous Herrick was able to segregate the *undated* sales slips and arrange them capriciously under various daily dates, and thus, with a waive of the hand, *arbitrarily created* daily totals corresponding approximately to the cash book entries!

This accountant was quite correct when he testified that both the sale slips and the "cash book" were incomplete records inasmuch as there is no way of determining if either represents the actual amount of all the cash taken in.

"Statement" C—"based upon information received,"[138]—how, or when, or where we know not, but it does not require Gargantuan wit to suspect the ubiquitous "Mr. D. Isaacs".

This statement (representing the purported "settlement" between the insurance companies and their trustee) is prepared upon the basis of the accuracy of Isaacs' purported retail sales and shows an *"appar-*

(136) Tr. p. 137.
(137) Tr. p. 246.
(138) Tr. p. 247.

cnt overpayment[139] by this honest salvage man to the complainants of $1.87; and exhibits this loyal accountant and his employer in a characteristically generous mood and sportive exercise of the imagination, seemingly delighting in the incongruous, the ludicrous and the droll, for there are no papers or records anywhere nor does Isaacs' original statement show that the retail sales were segregated from the sale in bulk, or that the "settlement" was made with any knowledge on the part of these companies, that any part of their stock had been lumped off in bulk at wholesale. Yet this loyal accountant (this brave Warwick), in his excess of zeal has not only segregated the retail and bulk sales in his "settlement"—but even *"Sold to H. C. Seynei & Co."* the complainants' merchandise in bulk, as follows (upon page 247 of the transcript):

"Net Receipts, Sept. 6-27, as per Statement A		$13,834.32
Balance of Stock, Sold to H. C. Seynei & Co., Sept. 30, as per Memo. Received		11,094.00
Total Net Proceeds		$24,928.32
Less Commission to D. Isaacs, as per Memo. Received		5,780.38
Sales, Sept. 6-27	$17,807.92	
H. C. Seynei & Co.	11,094.00	
20% of	$28,901.92	
Net Proceeds		$19,147.94"

Could clearer proof be brought forward of the utter inaccuracy and bias of this so-called "Report"?

(139) Tr. p. 242.

The trial Court evidently based its decision on the above statement rather than the whole evidence in the cause.

"Statement" D, purporting to show deposits in the Seattle National Bank is worthless for any purpose, as the data upon which it is based was excluded by the Court,[140] and there is no foundation for it upon the record. It was based upon purported "deposit slips" admittedly not the originals, and the deposition of the bank for the originals or certified copies thereof was not sought by the defendant; the deposit slip copies produced having been made up to suit his convenience.

The statement also exemplifies in the highest degree the bald jugglery of figures and misrepresentation to the Court by this trustee, in that it sets forth Isaacs' claim of only $19,744 deposits, whereas the evidence of the Seattle National Bank by its auditor shows $20,744. The "statement" is also based on Isaacs' production of only four checks sent him from his business at North Yakima, Wash., in the sum of $2850,[141] whereas his manager there, Mrs. Benzion, his wife's sister, testified she sent to him in Seattle some $7000 in checks during the period.[142]

Centuries ago our criticism was coined for us—

"Falsus in uno, falsus in omnibus."

(140) Tr. p. 157.
(141) Tr. p. 156.
(142) Tr. p. 166.

"Statement" E is based *exclusively* upon matters and information *de hors* the record "afforded to us by Mr. D. Isaacs.[143]

It rests entirely upon the conversation with his employer in which he claimed that of the total expenditure of $3973, a part or $2192.70 was made by check.

In view of the admitted fact that Isaacs did not show or offer upon the trial his checks, or check stubs, or bank books, claiming not to have them, thus depriving the witness and the Court of any way of determining what expenses actually were paid by checks, if any, the presumption is against this trustee, and the *cestui que trust* claim these expenses were all paid out of the cash drawer; and as the evidence shows that "cash book" entries do not include the monies taken out of the cash drawer, therefore the purported total amount of $17,779.60 sales entered therein is short.

This "statement" discloses that through adept manipulation of figures Isaacs' bank deposits show an apparent excess of $915 over the amount available for deposit.

His accountant only accounts for this again by one of those mysterious conversations with his employer, who placidly explained that he must have deposited money from other sources! Herrick's purported "Report" thus naively concludes—

> "Mr. Isaacs informs us that without specific recollection it is probable that deposits were made by him within these stated total deposits in the period of moneys received by him from other

(143) Tr. p. 243.

> sources. The information afforded by this Statement E is not definite or conclusive but it is indicated that the total excess of the deposits over the funds available for deposit from the sale in the sum of $915.54 is subject to a reasonable explanation and in any event is not of a relatively large amount.''[144]

I have already shown (pp. 103-4) why Isaacs' recollection of his ''other deposits'' was so poor.

It is doubtful whether this expert accountant (who it will be remembered was only employed by Isaacs after his first choice, Mr. Dolge, a highly esteemed accountant of San Francisco, had produced a ''Report'' which was highly disadvantageous to his employer), were being filched of $915 he would so calmly say it ''is subject to a reasonable explanation and in any event is not of a relatively large amount''.

We say, with all due respect to the honored Justice from Spokane who presided at the trial, that evidently the District Court, not to be outdone by this *largesse* on Herrick's part, confirms him in it by accepting and receiving in evidence a ''report'' of no ''relatively large'' importance, being, as Herrick himself admits, an opinion not based on facts but depending in the last analysis on self-serving explanations ''by Mr. D. Isaacs'' *de hors* the record and made ex parte weeks before the trial.

Not only have misrepresentations been made to the Court and evidence withheld from it, but the evidence has been withheld from this trustee's own witness,

(144) Tr. p. 244.

this accountant, whose "Report" without it makes one think of Alice in Wonderland.

This whole "purported" report is a most disingeniously imaginative composition as bearing upon this trustee's jugglery of figures and even upon his honesty and probity; a written-to-order display of wordy and bombastic legerdemain with wrong conclusions based upon false and incomplete premises. It reminds one of the story of the man talking of the kettle, which was broken when he received it, cracked when he loaned it and whole when it was returned.

The defendant's whole case rests upon this absurd concoction, grotesque by all the principles and rules of evidence and equity, and its reception in evidence and adoption by the District Court as a whitewash of this trustee, was absurd and gross error and a repudiation of all the fundamental principles of evidence (Assignments of Error XXXIII, Tr. p. 192; XXXIV, Tr. p. 204; XXXVII, Tr. p. 207).

CONCLUSION.

In conclusion, first with reference to this "purported" report based in the last analysis upon Isaacs' verbal statements out of Court, these complainants call to the Court's attention that their affirmations and statements are all based on *facts in evidence* and the established presumptions of equity against one in a fiduciary capacity as this trustee, having exclusive and sole possession of the trust fund and handling it

admittedly to his personal profit, and upon the testimony of numerous witnesses not parties to the cause, uncontradicted and unimpeached.

Thus they have proven decisively the bald dishonesty and machinations of this trustee in fraudulently and sedulously concealing the correct total of his cash sales for these companies, and his misrepresentations to them through his statement that their merchandise was sold by him at an average of 20% *below* their original Bridge inventory cost price, whereas the record overwhelmingly exposes their property was disposed of for some 20% *above* the original Bridge cost price of the first inventory; a difference of 40%, a personal profit thus misappropriated from them by their trustee.

Isaacs' unhappy showing in reply made through selected data and non-production of bank books, check stubs, original checks claimed paid out for expense items; of original vouchers; of cash register totals, adding machine totals, and salesmen's indexes by which alone the number of sales slips missing from the gratuitous selection offered the Court and their amount could be ascertained, and his admissions as to their shortages, have been fully indicated at length to the Court within these pages; together with the glaringly sophisticated and improper book of account, the so-called "cash book" by this trustee of the proceeds of the trust fund. These phases of the cause therefore are submitted to the Court for its decision with the respectful insistence that in no wise has this trustee shown an honest and candid desire to reveal

the facts of his manipulation of this trust fund, but has in fact attempted to obstruct the Court in its determination, by withholding from it the only proof by which alone the correctness of the self-serving data furnished it could be determined; and whenever one withholds evidence, it is presumed it would have been against him if produced.

> "When one willfully suppresses testimony, the presumption is, that such testimony, if produced, would be adverse to him."
>
> *People v. Hurley*, 57 Cal. 146.

The Remedy.

He should be charged as trustee with the value of the trust fund as given in the first inventory.

The view of your complainants is, that this defendant as their trustee has made an utter failure of his attempted accounting upon this trial, and should be therefore charged with the amount of the trust fund turned over to him as shown by the first inventory in exact figures in the sum of $45,954, and interest thereon.

Decision by Judge Van Fleet in a simliar case.

In this view they respectfully cite to your Honors as a precedent in this jurisdiction the unreported opinion of Judge Wm. C. Van Fleet in deciding a similar case—

> *Seynei v. Isaacs*, In Equity, No. 83, U. S. District Court, Northern District of California, February 9th, 1916,

in which this same trustee was defendant, and which related to a portion of the same trust fund involved

in the cause at bar, that action having been instituted by his partner, Mr. Seynei, to enforce a similar accounting.

"The result of this hearing has left the Court without any doubt of its duty in the premises. I very frankly say that so far as my conclusion is concerned I think if the truth could be fully developed it would be shown to be very favorable to this plaintiff. Unfortunately the showing made here is such as to give the Court no tangible, no perfect basis upon which to ascertain the amount in exact figures that the defendant has realized from this property. I have indicated perhaps sufficiently during the hearing without repeating it the vice that exists in many respects in the showing made by this defendant. The testimony in behalf of defendant here of a contradictory—and I might add a more sinister—character is such as not only largely to destroy the value of the evidence of the defendant himself but of several of his witnesses. I am not at all satisfied in my mind that these purported books of account that have been put in before the Master and again on this hearing have not been sophisticated from start to finish. I have the evidence before me of the defendant himself that one book "Exhibit D" that he relied upon as an exhibit before the Master as a book made in the due and ordinary course of the transactions as they occurred was purely manufactured—made up for the occasion—after the suit was commenced and in the face of the litiga-

tion itself. So that I really have no safe basis upon which to rest my judgment in determining the values with which the defendant should be charged growing out of these books in any way. Under the law the defendant was occupying a fiduciary relation toward his partner. He had this property in his possession; he was bound to account for it; he was bound to account for it in accordance with just, reasonable and honest methods. That is all he was called upon to do, but he was required to do that, and he has not done it.

"There is one tangible piece of evidence here upon which the mind of the Court can seize as approximating, taking all the circumstances into consideration, what was doubtless regarded to be about the value of this property at the time it was boxed up for shipment to San Francisco, or at least to the warehouse, namely, the inventory made by the parties at Seattle. The evidence satisfies me perfectly that that inventory was made by the two partners jointly; that it represented their joint ideas as to what the value of that property then was. Counsel for defendant says that that was merely put down as the original cost price of the property; I do not think the evidence sustains that view. That inventory, very doubtless under all the evidence here, was made at a time prior to any conception in the mind of the defendant of the idea of trying to appropriate this property and claiming that he was the sole pro-

prietor of it and that he would account to no one for it. I think the Court is entitled to look to that inventory as representing more nearly the judgment of these parties to this litigation as to what the value of that property was than any other source furnished by the evidence. I am going to take that inventory and find it as the proper basis upon which the defendant is called upon to account here, just as I suggested yesterday to counsel I should do unless my mind was satisfied by the evidence as to the transactions here that that would not be just. As I indicated heretofore I think it is more than just. I am strongly inclined to believe under the evidence, not only of the witnesses who were connected with this business themselves, the salesmen and Mr. Sidder, and the deductions made by the expert accountant from these books as well, that if anything, I am, in taking this inventory as the basis doing an injustice to the plaintiff rather than the defendant; but it is the only tangible basis I have upon which to require this accounting. It will be made upon that basis and it will include this entire lot of goods and will therefore leave out of account the fag end that is still in the hands of the defendant. That inventory then with the values there stated will be taken as the basis of value upon which the defendant will be called upon to account."

IV.

THE SALE IN BULK.

Preliminary.

The Opinion in the Lower Court.

I am strongly of the opinion that the enunciation by the District Court of the rule governing a principal's right of repudiation of an agent's sale to himself for the principal is erroneous and that it fails most signally to state the principal's absolute rights in the premises.

The District Court has in effect held that the agent's failure to inform the principal of facts known, or which ought to have been known to the agent, does not give the principal the absolute right of repudiation.

This seems to me a most radical departure from a long recognized rule. It establishes exceptions which have never heretofore been recognized. It lets down barriers by which principals and beneficiaries have always been protected from their agents and trustees and if it remains as the utterance of this Court, great mischief and hardship are, in my opinion, likely to occur in a multitude of everyday transactions, especially in the insurance world, between persons occupying confidential relations.

Insurance companies are peculiarly at the mercy of corrupt salvage men, who, where they find a weak adjuster, conspire to rob the companies of thousands of dollars. The chief protector of the companies is such an action for an accounting as the cause at bar. If the law as interpreted by the District Court in this

instance is to stand, it lets down the bars and gives free rein in the future to all kinds of combinations between salvage men and adjusters—for the salvage man such as this defendant need only say "I told the adjuster everything", to estop the companies from ever seeking redress in the Courts against such thievery.

I am confident that the true rule will be found to allow no exceptions, that is to say, that a principal has an unqualified right at his own option to set aside any sale made for him by his agent to himself, upon discovery of any, even slight, failure of the agent to disclose pertinent information which might have influenced the principal's conduct. Equity has always been keen to scrutinize dealings between parties in the relation in question, and has uniformly adopted the unrestricted rule in favor of setting aside such sales, which rule, I respectfully submit, has been practically overturned by the District Court's opinion.

There are, of course, hosts of authorities both English and American on the question, and I take the liberty of quoting a few verbatum not to cite principles of law to your Honors but for the clarity and directness of reason of these individual citations as closely administering the cause at bar.

In *Tate v. Willamson,* L. R. 1 Eq. 528, 536 (1866), affirmed by the Lord Chancellor in *Tate v. Williamson,* 2 L. R. Ch. App. Cas. 55, a circumstance somewhat similar to the concealment of the depreciation of the second inventory in the cause at bar existed. The agent offered a certain sum for his principal's property. The next day the principal accepted the offer. Before

an agreement had been signed, the agent obtained a valuation by a mining surveyor, and the sale was completed without this valuation having been communicated to the principal (syllabus, *Tate v. Williamson,* 2 L. R. Ch. App. Cas. 55).

In holding that this concealment necessarily entitled the principal to a judgment of rescission irrespective of whether or not an adequate consideration was paid and irrespective of the fact that all other circumstances of the transaction were fair, the Vice-Chancellor (*Tate v. Williamson,* L. R. 1 Eq. 528, 536 (1866) said:

> "The broad principle on which the Court acts in cases of this description is that, wherever there exists such a confidence, of whatever character that confidence may be, as enables the person in whom confidence or trust is reposed, to exert influence over the person trusting him, *the Court will not allow any transaction between the parties to stand, unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so trusting him.*
>
> "The young man having then said that he was determined to dispose of his property, *it was absolutely impossible for Robert Williamson, filling as he did that position of confidential adviser, to enter into any treaty for the purchase of that estate,* without communicating to him *every particle of information* that he himself possessed with respect to its value" (page 537).

The Vice-Chancellor held that the suppression *"renders it impossible for the Court to sustain the purchase"* (syllabus).

The case was appealed to the Court of Appeals in Chancery (*Tate v. Williamson,* 2 L. R. Ch. App. Cas.

55, 65) and in affirming the judgment, the Lord Chancellor said:

> "Having stated my opinion with regard to the duty cast upon the defendant to communicate Cope's valuation to the intestate, it seems unnecessary to pursue the case further. The fair dealing, in other respects, of the defendant during the negotiation, and before the agreement was signed, becomes almost irrelevant. The refusal of the solicitors to proceed with the agreement unless the young man had some legal assistance, the recommendation of the defendant that the intestate should apply to his father for advice, the opportunity afforded him pending the negotiation of consulting any friends who were capable of advising him, the reference to Mr. Payne, whether merely for the purpose of completing the agreement, or to afford the intestate an opportunity of obtaining his opinion as to the value, *all these considerations are of no consequence, when once it is established that there was a concealment of a material fact, which the defendant was bound to disclose.*
>
> "*Nor, after this, is it of any importance to ascertain the real value of the property.*
>
> "*Even if the defendant could have shewn that the price which he gave was a fair one, this would not alter the case against him. The plaintiff, who seeks to set aside the sale, would have a right to say, 'You had the means of forming a judgment of the value of the property in your possession, you were bound, by your duty to the person with whom you were dealing, to afford him the same opportunity which you had obtained of determining the sufficiency of the price which you offered; you have failed in that duty, and the sale cannot stand.'* "

In *Rubidoux v. Parks,* 48 Cal. 215, the California Courts held that "the *utmost good faith* is required." If there is not the utmost good faith the equitable requirement is not complied with.

Mr. Freeman in his note to *Richmond's Appeal* (21 Am. St. Rep. 101) states the rule as follows:

> "Where a fiduciary or confidential relation exists between the parties to a deed, gift, contract or the like, the law implies a condition of superiority held by one of the parties over the other, so that in every such transaction between them by which the superior party obtains a possible benefit, equity raises a presumption, and casts upon the party the burden of proof to show affirmatively his compliance with equitable requisites, *and of entire fairness on his part.*"

Surely in these cases the principal is entitled to be informed not only of all the facts within the actual knowledge of the agent, but also of all facts which the agent should inform himself concerning,—that is of all facts which ought to be known to the agent.

In The Laws of England, by the Earl of Halsbury (Vol. 1. Title "Agency", Secs. 404 and 405, pg. 189), the learned author says:

> "An agent will not be allowed to put his duty in conflict with his interest, and therefore he must not enter into any transaction likely to produce that result, unless he has first made to his principal the fullest disclosure of the exact nature of his interest, and the principal has assented. *An agent does not discharge his duty in this behalf merely by disclosing that he has an interest, or by making statements which might put the principal on inquiry.*
>
> "In these and all other transactions with the principal, he (the agent) must disclose every material fact which is or ought to be known to him, if it were likely to operate upon the principal's judgment. If this is not done the fairness of the

transaction is immaterial and it is voidable at the principal's option.

"An agent must not, without the knowledge of his principal acquire any profit or benefit from his agency other than that contemplated by the principal at the time of making the contract of agency. The rule applies in spite of the fact that the agent has done his best under the circumstances or incurred a possibility of loss, or that the principal has in fact received the benefit he himself contemplated from the transaction. All such profits and the value of such benefits must be paid over to the principal."

And the rule is axiomatic as in the present cause that where a beneficiary seeks to set aside a sale upon an accounting he is not required to restore the money or other benefits he has received from his adversary, if, whatever might be the result of his action, he would be entitled to keep what he has retained. Cases of that nature arise where, as here, a party has been led by fraudulent contrivance to accept less money than was due him. They retain that and demand their trustee further turn over to them the amounts which this accounting shows due. This is best exemplified perhaps in the leading California case of *Watts v. White,* 13 Cal. 321. That was a suit between partners—plaintiff seeking to set aside a deed of his interest in partnership property procured by fraud of defendant, and to enforce an accounting. The Court said that plaintiff risked his case on the result of the accounting, and since he alleged that a greater sum was due him than he had received for the deed no offer to restore the consideration for the deed was necessary before suit. I may observe that in such a case the

money received by the plaintiff becomes part of the subject of the accounting; in any possible event he has an interest in it, and until the adjustment of the accounts is as much entitled to it as the defendant.

(A) THE FACTS

Complainants' bill contains the following:

> "That said transfer to himself by their trustee was a gross fraud and imposition upon your complainants who ask that said transfer be set aside and that their said trustee be charged with the full value of said trust fund together with his profits thereon additional in such sum as the Court shall find due upon the accounting herein prayed, together with legal interest thereon from time of said sale."

To this end their proof upon the record discloses, in brief, the following salient facts relative to Isaacs as their trustee, viz:

1. *Misrepresentation;*
2. *Actual fraud;*
3. *Concealment;*
4. *Misappropriation;*
5. *Gross inadequacy of Consideration.*

In this regard your Honors' attention is respectfully called to our Assignments of Error VIII to XIX, inclusive (Tr. pp. 172-180, and XXVIII, XXIX (Tr. p. 186), and XXXI (Tr. p. 187).

After selling one-third (⅓) of the stock at a three weeks' retail sale to the public, Isaacs closed down that

retail sale for the purpose of transferring the balance of the stock secretly in bulk at wholesale to himself. The evidence overwhelmingly shows that such a thought was in his mind from the first.

(1) His Misrepresentation.

(a) There was no necessity of closing down the retail sale.

All the five salesmen and Mr. Bridge and Mr. Bailey testify to its having been most successful.

(b) The misrepresentation of the stock's value.

This trustee misrepresents the facts when he testifies the expenses on the complainants' retail sale were eating up the profits and he couldn't afford to continue the sale any longer;[145] for his own exhibit, the notorious purported "Cash Book" kept in lead pencil, shows he was still conducting the retail sale at a profit at the time he closed it down and that the sales were not appreciably diminishing.[146]

The entries on page 68 show that the sales that third week were only $300 less than the week before.[147]

Also when he testifies the expenses were over $200 a day,[148] his own exhibit, this same "Cash Book" flatly contradicts him and gives him the lie direct. It shows his expenses were not over $125 for each working day. or $750, for the entire third week, and this *includes* rent, light, advertising, labor, etc.

(145) Tr. p. 143.
(146) Tr. p. 246.
(147) Tr. p. 246.
(148) Tr. p. 143.

The Seynei books (Tr. p. 227) show that at the Seynei 42 days' sale, conducted under exactly the same conditions in the same store, the expenses were only $75 per day.

Isaacs' "cash book" shows the total receipts for that third week were $3739, or $623 a day; thus the expenses were only 1/5 or 20% of the receipts; *being less than what Isaacs himself testifies are the average expenses,*[149] and left a good profit.

To show that the actual net returns realized the third week of the complainants' retail sale *averaged higher than their trustee's "bid" of 45%*—I present the following three tables:

First. If these goods were marked and sold 20% above the original Bridge inventory cost as has been testified to, then this merchandise which was sold during that third week of the sale realized NET, after deducting 20% for expenses, the original Bridge inventory prices themselves.

Yet Isaacs closed down this sale in order to buy this merchandise which was then selling *net* at its original inventory cost prices, for himself for 45% of, or *55% less than those same inventory prices; a loss to these complainants of 55%.* In spite of this, the trial Court held Isaacs only purchased the stock in order to prevent its being sacrificed!

Second. Even if this stock sold on an average at these inventory cost prices during that third week, it realized NET 80% of those prices, which was 35% HIGHER than Isaacs' purchase price at 45% of those inventory cost prices.

(149) Tr. p. 154.

Third. However, even if we assume the merchandise that third week sold 20% below its inventory cost price, as Isaacs' depreciated figures falsely indicate, EVEN THEN IT REALIZED NET 60% of those inventory prices during that third week, which was fifteen (15%) per cent HIGHER than Isaacs' purchase price of 45% of the same cost prices; and it must be remembered that Isaacs' "sacrifice" bid of 45% was not net; he further deducted 20% as commissions thus depreciating his bid of 45% still further; also Isaacs' bid in reality was 35% or less of those inventory cost prices and not 45% as represented by him.

In view of the above figures (and figures do not lie) and in view of the cash sales taken from the Seynei books showing that Isaacs after the retail sale for the complainants continued to sell this same merchandise for himself at a profit of 10% *above* the same Bridge inventory cost prices, can it be said their trustee honestly protected these complainants in closing down their retail sale? Certainly not, as these figures show he could have continued their sale right along at a profit to them. Nor can it be said he correctly represented the true value of that stock, when he testified he said the expenses were eating up the profits; that the expenses were over $200 a day and the receipts were down to $400 and "running down and down"?[150]

(c) The misrepresentation of its condition.

Isaacs also misrepresented the facts when he said the stock was all run down and sizes broken up.[151]

(150) Tr. p. 143.
(151) Tr. p. 143.

Mr. Mason testifies the stock was a staple stock and could not be badly broken up if two-thirds of the entire stock remained after the retail sale; and that this remainder could not be "remnants".[152]

It is evident that if it only required a few hundred dollars worth of stock at the beginning of the Seynei sale to reinstate this "remnant", it could not have been greatly reduced in quality or sizes.

The clothing was *one-half* (½) the entire stock[153] and it only required less than $1000 to replenish it during the entire *seven* weeks of the Seynei sale; these new purchases were less than *one-sixteenth* (1/16) of the entire clothing even at Isaacs' depreciated figures.

Mr. Jeremy testifies only fifty suits and a couple of dozen pants and some raincoats were purchased.[154]

Can it be truthfully said the suits were greatly broken up if it only required fifty (50) to fill out the necessary sizes?

The same is true of the shoes and other lines, for in the beginning the Seynei books show only a small amount of shoes were purchased.

Mr. Mason testifies to the self-evident truth that if a broker contemplated buying the balance of a stock, he would, while selling for his principal, be tempted to save the best stock for himself.[155]

(152) Tr. pp. 116-117
(153) Tr. p. 60.
(154) Tr. p. 78.
(155) Tr. p. 114.

That this trustee did so contemplate the purchase of this stock for himself in bulk while conducting the retail sale for these complainants is shown by the fact that soon after the retail sale started he formed a partnership agreement with Mr. Seynei[156] to handle this very stock in that very way.[157]

(Judge Van Fleet in the Interlocutory Decree in *Seynei v. Isaacs,* Eq. 83 in the same Court, established the date of the forming of that partnership as September 10, 1913.) Isaacs began his retail sale for these complainants on September 6, 1913.

Mr. Seynei testified that Isaacs did actually lay away some of the best of the merchandise, some $5000 in value.[158]

The two salesmen, Messrs. Basher and Johnson, testify not over 10% of the entire stock was damaged.[159] If 90% of the entire stock was good and undamaged the proportion of damaged in the remaining two-thirds after the retail sale could not have been very great, nor greatly depreciated in value, for Mr. Meyer testifies even the damaged on the retail sale was marked *above the Bridge cost price;*[160] and Mr. Seynei[161] and Mr. Jeremy[162] testify the damage to the entire stock was not over $500 or $600.

(156) Tr. p. 53.
(157) Tr. p. 159.
(158) Tr. p. 54.
(159) Tr. pp. 87-88-90.
(160) Tr. p. 90.
(161) Tr. p. 45.
(162) Tr. p. 75.

Prima facie if this stock sold for 10% above its inventory Bridge cost, as the Seynei books show, it could not have been very much run down or "remnants".

The representations of this trustee therefore were and are false when he represented the stock was all run down and the expenses were eating it up and the only reason he took it was because he expected to handle other salvage stock,[163] for his own books contradict him and he handled no other stock, and, as he testifies, had no other stock in view at the time he formed his partnership.[164]

(d) The sale in bulk a frame-up and arranged beforehand.

Mr. Bridge testifies the sale in bulk "looked to him like a frame-up.[165]

Mr. Jeremy testifies there was no reason for closing down the retail sale, it was running along alright.[166]

Mr. Bailey's evidence corroboates Mr. Seynei and Mr. Jeremy and Mr. Bridge and shows plainly Isaacs had it all arranged beforehand to get control of the stock and had formed a partnership with Seynei for that purpose.[167]

(163) Tr. p. 144.
(164) Tr. p. 159.
(165) Tr. p. 95.
(166) Tr. p. 77.
(167) Tr. pp. 101-102.

(e) The mute evidence of Isaacs' own books and handwriting.

Isaacs' own handwriting and figures on the Hotel Herald stationery[168] showing the value of the stock purchased in bulk as $24,603.39 shows plainly the stock he bought in bulk was not "remnants" and all broken up and flatly contradicts his own oral statements and representations in the premises.

His partnership, the Seynei books do likewise, by charging the merchandise up to the partnership at $24,600.00, and Mr. Seynei testifies Isaacs compelled him as the resident partner to do business on that basis,[169] and these books themselves corroborate him; as do also the actual profits made by the defendant's firm of Seynei & Co. on the transaction as shown by the books and their summary by Klink, Bean & Co.[170]

All of which shows Isaacs directly misrepresented both the value and condition of the stock.

(2) Actual Fraud.

When agent violates trust he commits a fraud.

Agents are bound to exercise the utmost good faith towards their principals and cannot lawfully take secret interests in contracts which they are authorized to make; and when an agent is employed to sell he cannot lawfully become the purchaser, or if he is authorized to buy he cannot lawfully become the seller;

(168) Herein p. 166.
(169) Tr. p. 62.
(170) Tr. pp. 61-83.

and *when he violates these rules he commits a fraud on his principals.*

Smith v. Seattle L. S. & E. R. Co., 72 Hun. 202.

In addition to this direct misrepresentation by this trustee above set forth, I respectfully refer the Court to the following facts as shown by the record.

(a) While trustee for the complainants Isaacs schemed to transfer their trust fund secretly to himself.

He opened a sale for these companies on September 6, 1913, and on September 10th formed a secret partnership with H. C. Seynei, Bridge's manager, to handle for their mutual profit the balance of the stock as soon as they could get possession of it, and as Seynei testifies Isaacs conferred with him for the elimination of bidders at the sale in bulk.[171]

In accordance with this secret compact and after the sale on behalf of the complainants had only run nineteen days, Isaacs, their trustee, closed down the complainants' sale at retail to the public on a Saturday night, and placed the following advertisement in the Seattle Times, the next day, Sunday, in the want ad. column:

> "The balance of the A. Bridge & Co. stock, 103-5 First Ave., Seattle, will be offered for bids Monday, Sept. 29, at 3 P. M. Coast Fire & Marine Insurance Co., D. Isaacs, Manager."

Such short notice would certainly not induce any competition, for it would not reach outside bidders.

(171) Tr. p. 55.

If Isaacs had been sincere in his efforts to obtain competition in bidding he would have advertised while the retail sale was in progress (as Mr. Bridge says should have been done[172]), or he would have telegraphed to bidders in larger markets such as Portland and San Francisco (as Mason says his rule was[173]), and it is significant that Isaacs did neither. Mr. Mason testifies:

> "Taking into consideration the fact that the defendant as the complainants' broker was contemplating the purchase and buying in of the stock for himself, and did buy it in for himself, I do not consider such short notice fair to these complainants in obtaining the best possible price for their merchandise."[174]

Isaacs then consumed Sunday in taking a depreciated inventory of the balance remaining of complainants' stock, claiming it to be $24,653 at Bridge cost prices as a basis for his own percentage so-called "bid", and on Monday morning, at eleven o'clock, instead of three o'clock in the afternoon, he walked out in the store and said glibly, "Well, boys, the stock's sold to Harry Seynei", and thus he sold to himself through a dummy, and later sent the statement set forth in the bill of complaint to the complainants showing no sale in bulk nor that he himself was the purchaser, and told his partner, Mr. Seynei, that he didn't want the companies or Mr. Main to know he was the owner of the

(172) Tr. p. 95.
(173) Tr. p. 117.
(174) Tr. p. 114.

stock[175] and prepared advertisements and had them placed in the newspapers over the name "Harry Seynei", carefully omitting even the name "& Co." (Complts. Exs. 10, 12, 13, 14, 15).[176]

All this, though at the time Isaacs was actually carrying on the same business (as shown by the little want ad. notice of the sale in bulk) under the fictitious name and style of "Coast Fire & Marine Insurance Co."!

As Mr. Bailey testifies:

> "The defendant did not appear publicly as a bidder in his own behalf. The bid was made in the name of H. C. Seynei; and on the following Monday the sale was made in the name of H. C. Seynei as purchaser."[177]

So not openly "*vi et armis*" did our trustee seize it; his trick and device being better described in the gentle raillery of the Latins—"*molliter manus imposuit*".

(b) The evidence shows there were no bona fide bids or bidders at the sale in bulk and that the sale was "fake".

Mr. Seynei testified he was in the store at all times during the insurance retail sale but did not see anyone examining the stock for the purpose of making a bid;[178] there was no time given for any such examination;[179] nor did he know of any one sending in bids;

(175) Tr. pp.54-58-69.
(176) Tr. pp.221-2-3-4.
(177) Tr. p. 101.
(178) Tr. p. 56.
(179) Tr. p. 65.

nor did he see any bids; nor did Isaacs open any bids; on these points he was most emphatic, and counsel's rapid-fire and disingenuous cross-examination could not confuse him—for instance:

"Mr. Schlessinger. Now, there has been some suggestion made here—I say 'suggestion'—that Mr. Isaacs bid in that stuff clandestinely. Were you present when those bids were opened?

A. What bids?

Q. The bids for the remnant stock, the tail end of the stock?

A. *There were no bids*——

Q. (intg.). Were you present when that sale occurred?

A. Yes.

Q. Were there any other persons present bidding on that stock?

A. There were three, if I remember, but they were not exactly bidding.

Q. Did any other persons file bids for that stock?

A. Those were not bids. * * *

Q. These goods having been purchased by Mr. Isaacs,—and by the way there was a bid put in there for that stock of goods, was there not?

A. Mr. Isaacs put in the bid.

Q. With your knowledge?

A. He told me how much to put in the bid for.

Q. It was put in in the name of Seynei & Co.?

A. No.

Q. In the name of Harry Seynei?

A. Correct. * * *

Q. Were you present when Mr. Isaacs' bid was opened?

A. Yes.

Q. Were you present when other bids were opened?

A. As I said awhile ago *I didn't know of any other bids.*

Q. Were you present when any other persons were present there offering to buy that stock?

A. There were three gentlemen there, as I recall.
Q. Were you present when there was a bid opened for $10,000?
A. No."

Mr. Seynei specifically says that none of the men mentioned by Isaacs as having bid,[180] were bona fide bidders for this stock; and further, Isaacs asked him to speak to his friends so that they would not interfere and Isaacs could get the stock.[181] Isaacs did not wait until three o'clock as advertised but the stock was sold in the *forenoon*.[182]

Mr. Jeremy testified:

> "He was present when the merchandise was sold in bulk; there were only three or four people there besides Isaacs and Mr. Seynei; that Isaacs came down from the balcony and announced the stock was sold to Harry Seynei; that was in the forenoon; 'I did not see him open any bids. I saw no bids. I saw no one looking around examining the stock.' Again on cross-examination he swears 'I did not see any bids for the tail end of that stock,' "[183]

and defendant counsel's characteristic cross-examination was unable to shake him.

Mr. Bailey's testimony was that he was in the store at the time of the sale that Monday *morning* and heard two men complaining because they had not been given time to examine the stock, as they would like

(180) Tr. p. 65
(181) Tr. p. 55.
(182) Tr. p. 54.
(183) Tr. p. 79.

to have bid. He saw no bids. The time was too short for any prospective bidders to examine the stock.

> "Mr. Seynei told me he had got the stock, but that he knew he would all the time.[184] I knew Mr. Seynei expected to get the goods but I did not know how they were going to do it. I remarked that it would be a pretty good joke if someone else had come in at that moment, when they had agreed upon their partnership, and bid in the goods, that is put in a bid over Seynei; and Seynei laughed and said that could not very well happen. Mr. Isaacs knew what to bid and gave it to him to put it."[185]

Mr. Bridge testifies:

> "I had people myself who wanted to bid on that stock. When we came in, that was in the morning, the thing was all over; it was all over before noon. I came in with friends of mine who figured to put me in business. I had no chance at all. The whole thing looked to me like a frame-up because I was concerned in that stock as much as anybody and I absolutely had no chance; it looked to me like a frame-up proposition. I had the fixtures there, worth about $5000, and I thought I had a chance to get back into business, for which there were people who wanted to stake me."[186]

(c) Isaacs lone tale.

There is an old French proverb which says:

> *"Whoever excuses himself, accuses himself."*

In view of all this great mass of testimony against him is it possible to give credence to Isaacs' lone tale, for Isaacs alone claims there were bona fide bidders.

(184) Tr. p. 102.
(185) Tr. p. 108.
(186) Tr. p. 95.

These "bidders", according to his own story, were however chosen by himself—to bid against him! And what were their names?

Karl Shermer, Abe Kessler, Morris Buttnick, Isadore Colsky, and Sam Cone, gentlemen whose very names smack of honesty and good intention, "friends of Mr. Isaacs",—a picturesque band under whose black flag the defendant himself tells us he shipped when he ran up the Jolly Roger and bore down on this gold laden merchandise galleon of the complainants.

Of these (according to Isaacs) Shermer bid 25% of value—of $24,600; Sam Cone's bid was between 25% and 30%; Morris Buttnick's between 25% and 30%; Abe Kessler's was 30%; and Isadore Colsky's $4200: But D. Isaacs generously bid $11,094! Why? Ah, there's the rub; a rank outsider "butted in" and spoiled the game. Is it not true, if we are to accept the defendant's own story, that through the kindly aid of the gentlemen named, who were his friends, and through their honest conviction that the Bridge stock was but remnants and paltry trash, that our worthy trustee would have secured it for less even than he did pay, had it not been for one lone countryman, living way out at Bellingham, a dark horse in the race for this merchandise, Brenner by name, who came in but evidently *did not see* the merchandise concealed in the balcony which was not open to the public as has been testified to, and innocently bid $10,000 "but only on condition he should get a lease on the premises". But Isaacs was there. He says he told Main he would protect the companies, and in his righteous

endeavor, not only prevented the presumptuous Brenner from "getting a lease on the premises", but took the lease himself, bid $11,094, deducted his commissions of 20% on his own clandestine purchase, a paltry $2218, and as protector proudly handed the companies as protectees $8875 in actual cash for their goods which he himself had inventoried at wholesale cost at $24,653. *O tempora! O mores!*

The above, of course, is the defendant's own story, which is flatly contradicted by Mr. Seynei, Mr. Jeremy, Mr. Bailey and Mr. Bridge. It is difficult to treat his contention even with politeness, but I draw the record on him here, not because his explanation of the smallness of his bid will have any weight with the Court, but because his efforts at escape border on the amusing.

(d) Our trustee eliminates competition against himself as a "bidder".

Isaacs instructed Mr. Seynei to arrange for the elimination of competition at the sale in bulk[187] and clearly violated his duty to the complainants—*especially so when at that very time he himself contemplated becoming the purchaser of the property, and the elimination of competition was solely to that end.* Under such circumstances it was his bounden duty to encourage in every manner possible any person who contemplated becoming a purchaser of the property. This was clearly a case where, as said by *Mr. Pomeroy,* post, "the agent united his personal and representative characters in the same transaction" and where

(187) Tr. p. 55.

he was "exposed to the temptation or brought into a situation where his own personal interests conflicted with the interests of his principal and with the duties which he owed to his principal". The candor and disinterestedness referred to by Mr. Pomeroy were wholly wanting, and such acts on Isaacs' part characterize the transaction in question as unfair and lacking in the good faith which equity requires.

As said by *Mr. Mechem,* post, "a court of equity, upon grounds of public policy, will subject it (a transaction of this kind) to the severest scrutiny". Tested by this rule, the transaction would be voidable upon the ground alone of Isaacs' attitude in instructing Mr. Seynei to see that all real competition was "*eliminated*".

(e) The trial Court ignored Isaacs' elimination of competition and depreciation of the second inventory.

The opinion and decision in the trial court makes no reference to the elimination of competition and of bona fide bids or the depreciation of the second inventory by Isaacs, as explained in the following pages, seemingly in line with its astounding ruling upon the trial that

> "*The objection to all evidence tending to show actual fraud will be sustained.*"[188]

It is respectfully urged that such attitude is unprecedented in an equity cause, and clearly constitutes error under Assignments XV, XVI, XVII, XVIII (Tr. pp. 175-179) and VIII (Tr. p. 172).

(188) Tr. p. 78.

Mr. D. Issacs,

103 First Ave. South,

Seattle, Washington.

Dear Sir:

I hereby submit to you the following bid of the A. Bridge stock: Forty-seven cents ($.47) on the dollar of the invoice price.

Hoping this meets with your approval, I remain,

Yours truly,

(f) Our trustee drops his own "bid" 2% and cleans up $492.

The evidence shows that Seynei never put in a bid nor offered a bid, but that Isaacs prepared one at 47% (the carbon copy of which is in evidence and reproduced herewith), which Seynei signed and when Isaacs found everything was going along swimmingly dropped it down to 45%, thus directly depriving these complainants of $492 as they were entitled to the best price Isaacs could get for their property.

Mr. Seynei testifies,

> "He used my name on the sale, the bid being placed in my name. This is a copy of the bid (Plffs. Ex. 2); the defendant dictated that himself in my presence to the stenographer, and I gave it back to him after I signed it.
>
> "The defendant's statement to the complainants that the highest bid was 45% of the cost was false; the highest bid was 47%; the fact is this bid in his hands was two per cent more. Although my name was used the defendant was the actual purchaser; he bought the stock. I did not have eleven thousand dollars to pay for this stock at that time.
>
> "The defendant purchased these goods in bulk for himself from the complainants for $8875 net, and then sold them to our partnership for $11,094 and that amount was charged to our partnership on the books of H. C. Seynei & Co. afterwards opened; my books show that was the amount. The defendant thus made a personal profit of over two thousand dollars for himself."[189]

(g) Isaacs in writing admits his purchase to be worth $24,603.

That same (Monday) night Isaacs and Seynei sat down together at the Hotel Herald.

(189) Tr. p. 55.

Mr. Seynei testifies as follows:

"The sale in bulk of this stock occurred on a Monday morning and on that evening I had a conversation with him at the Hotel Herald in Seattle. At that time and in that conversation I went over with him the amount of the merchandise which had been purchased for the firm business. These two sheets of paper (Plffs. Ex. 16) upon the Hotel Herald stationery, were made out by the defendant at that time in his own handwriting. They show in his own handwriting what the merchandise was worth, what was to be charged up to me, how much to account for: on the other side the departments are specified, the individual departments such as Clothing Department No. 1 to Department 8. These are all in his own handwriting. At the time he made out that paper he said to me the stock was actually worth the amount of money written on that paper; and he figured the stock to us was worth $24,600; and that I should account to him for every dollar received for that stock."

"The defendant spoke at the time of the profit, about $13,000 he made on the transaction of the sale in bulk at that time and said he had made a successful purchase from the complainants; that there was no reason why I should not make a success of that stock; that I had the best of it, to his knowledge; and that the merchandise was actually worth the amount of the inventory—one hundred cents on the dollar.

"The defendant charged the partnership $11,094 for that Bridge stock; and that sum was placed upon the books as a credit to him at that time, and the firm of H. C. Seynei & Co. was charged on the books with merchandise at the value of $24,600. This merchandise was entirely original Bridge stock.[190]

"With reference to these books of H. C. Seynei & Co. which are in evidence, the defendant directed

(190) Tr. pp. 62-63.

Hotel Herald

TERRY AVE. & MARION ST

Seattle

735 - pr Shoes -	2166.80
123 " Rubber Boots - Shoes	[illegible]
Oilskins - Pants - Coats, Hats	11095
Hunt Coats. Overalls. Robes } Mackinaw & Khaki -	94487
Underwear. Sweaters.	3,662.98
Wool Shirt. Gloves -	1322.03
Hats & Caps - Helmets.	80.50
Vests & Apron - ~~[illegible]~~	58.50
Trunks - & Suit Cases	
	253.55 ✓
Collars - Cuffs - (8.50)	11.892.00 / 8.50
1108 - Suits	120850
157 Overcoats	37400
52 Cravenette.	89.00
4 Fur Coats -	2043.50
761 pr Pants -	24,603.39

11

Hotel Herald

TERRY AVE. & MARION ST.

Seattle

Cashmere Bakery

Tickets. Clothing Dept 1

Shoes " 2

Printing. Hats – Suit Co 3.

Electric Lights Shirts " 4.

Underwear " 5.

Schedule Arve. Alaska outfit 6.

Overalls 7.

Furnishing Goods 8

Furnishing 1 Co Flannel Suits.

1 " Heavy Cotton Robe.

1 " Cashmere.

1 " Cotton.

1 " Heavy wool. Med.

Suspenders. 2 grades.

Hkfs.

Work Shirts. fill in on Flannel & Dress Shirts

Neckwear.

Overalls & Jumpers.

Work Gloves.

Union Suits.

Blankets.

Hats.

Umbrellas.

their opening and was explicit as to how they should be kept in detail. It was at his direction that the merchandise sold in bulk to himself was debited in the ledger (Plffs. Ex. 7) at pages 4, 6, 8, 10, 12, 13, 14, 16, with the full amount of the inventory, $24,600.''[191]

(h) Conceals his ownership under the name "Harry Seynei".

Seynei testifies the partnership of H. C. Seynei & Co. was never known to the public, nor was it known that Isaacs had any interest in the stock, but the business was run and advertised under the name ''Harry Seynei''; the newspaper advertisements beginning with the picture of Seynei and ending with statements over his name.

> ''The defendant's interest in our partnership was never made known to the general public. It was at all times a secret sale; a secret partnership. This secrecy was compelled by the defendant. The reason he gave was that he did not care to have Mr. Main know anything about it, that he was the owner of that stock. So my name was used individually. The name of H. C. Seynei & Co. was never publicly used. I advertised in the public papers. These are the advertisements (Plffs. Exs. 11, 13, 14, 15).''[192]

Nearly all these facts are corroborated by Mr. Bailey in various portions of his testimony, who, together with Mr. Seynei and Mr. Jeremy, flatly contradict all of this trustee's self-serving declarations and statements as to his own honesty and good faith.

(191) Tr. p. 61.
(192) Tr. p. 61.

(i) How our trustee depreciated the second inventory for his individual gain.

Isaacs' method of depreciating the inventory made by him for a low basis for his percentage bid upon his secret sale in bulk to himself, was fully explained by the witnesses H. C. Seynei and John Jeremy, who were present at its taking, and whose testimony is unequivocally corroborated by the testimony and exhibits of the witness, Mr. George T. Klink, of Klink, Bean & Co., certified public accountants.

Mr. Seynei testifies that

> "Isaacs said *he would have to take an inventory and make a showing he was not the bidder for it, and to lump it off,* and he would advance the money *and buy it in my name*".[193]

Isaacs then laid some of the best merchandise, some $5000 in value, aside up in the balcony where the public could not see it.

> "and the remainder of the merchandise was tied up in bundles to make it look as discreditable as possible; that is *to make them look as cheap as possible*".[194]

And as to the further depreciation and method he testifies:

> "Mr. OLNEY (referring to the second inventory, (Plffs. Ex. 4) Q. Is this that inventory?
> A. Yes.
> Mr. OLNEY. We offer the same.
> The COURT. It will be admitted.
> Mr. OLNEY. Q. Was that inventory taken at Bridge cost prices?

(193) Tr. p. 53.
(194) Tr. p. 54.

Mr. Seynei. A. It was taken the same as it was taken for the insurance sale, except that *Mr. Isaacs took some suits tied up in bundles, suits which cost as much as $15 wholesale and mixed them in the $9 pile, lumped them off, and made them $9.50 or $9.*

Q. Then it was not taken at Bridge cost prices?

A. I said a while ago he mixed them up.

Q. As I understand, then, for the purpose of this inventory, the higher priced goods were taken and wrapped up in bundles and tied up and marked at a very much lower price?

A. It was mixed up with the cheaper stuff; so many suits at $9 mixed with the higher priced stuff.

Q. So that that depreciated the inventory so much?

A. Yes, the clothing was depreciated very much.

Q. How much did that depreciation run?

Mr. Schlessinger. We object to that as immaterial, irrelevant and incompetent.

The Court. He may answer subject to the objection.

A. It was considerable.

Q. About how much? You must know?

A. The inventory plainly shows the amount of suits taken at $9.50 for the insurance companies after the three weeks successful sale, and the amount of suits taken after the sale—the fire sale at $9.50, left in the remainder of the stock shows *there must have been at least $3000 or $4000, maybe more, maybe $5000, mixed up—that is the higher prices mixed up with the cheaper, and he reduced it by keeping them tied up in the cheaper merchandise.*

The Court. $4000, or $5000, in all?

A. Yes; that means in the lower cost.

Mr. Olney. He had the price lowered in that way?

Mr. Schlessinger. I object to that as immaterial, irrelevant and incompetent.

The COURT. I will admit it subject to the objection.

A. Mr. Isaacs himself dictated the inventory; he took the figures down.

Q. What did Mr. Isaacs say to you in reference to the depreciation of this inventory?

A. He naturally wanted it to look as low as possible.

The COURT. The question is what did he say if anything?

A. *Mr. Isaacs said he did not want Mr. Main to know how much stock there was left on the premises.*

Mr. OLNEY. What was the purpose of taking that inventory?

Mr. SCHLESSINGER. I object to that as calling for the conclusion of the witness and immaterial.

The COURT. I sustain the objection unless he knows.

Mr. OLNEY. He was a partner of Mr. Isaacs.

A. *The purpose of taking it was for him and me to become partners in the business.*

Q. I want you to state, Mr. Seynei, the conversation that you had with him, and what he said to you.

A. *He wanted to show his bid was highest, and make it look as though he bid as much as the stock was worth.*

Q. Have you stated all the conversation that you had with Mr. Isaacs in reference to depreciation of this inventory, and statements by him as to why he depreciated the inventory?

A. I think I have answered plain enough that he wanted the stock for himself, and had depreciated it as much as possible so he would not have to account for it.

Q. He said that to you?

A. Yes. I think I made it plain enough a while ago.''[195]

(195) Tr. p. 56-7-8.

> Mr. Seynei (continuing). "This second inventory (Plffs. Ex. 4) was made for the purpose of the sale in bulk.
>
> After the sale in bulk by the defendant to himself these prices which had been so depreciated and lowered were raised and the merchandise sold for more money than it was taken in the depreciated inventory for."[196]

And the substance of Mr. Jeremy's evidence is practically the same,—that the merchandise was made to look as cheap as possible by Isaacs' directions; that the goods were all stacked up in piles, lumped up, and the tables moved all around to make it look as rough as they could.[197]

Seynei said that $24,653 did not represent the true and correct cost of the merchandise, and that the inventory therefore *was not* taken at Bridge cost prices.[198]

The foregoing evidence alone should be sufficient to prove defendant's sinister methods in obtaining the stock without competition and far below its market value, but the actual data in evidence, the first and second inventories, corroborate this evidence and plainly exemplify it.

(j) The mute evidence of the inventories themselves prove this depreciation and corroborate Mr. Seynei and Mr. Jeremy.

This second inventory itself corroborates this testimony that the complainants' merchandise was entered therein *in lots* and was not taken piece by piece, as in

(196) Tr. p. 59.
(197) Tr. p. 78.
(198) Tr. pp. 56-57.

the first inventory taken immediately after the fire and which first inventory stands undisputed as being fairly taken at Bridge cost prices and included all the merchandise on the premises.

The difference of time consumed in the taking of these two inventories is also significant, two weeks were occupied in the taking of the first,[199] while the second inventory was taken in a day.[200]

Mr. Klink's report, complainants' exhibit 19, reproduced herewith, unanswerably confirms Seynei's and Jeremy's testimony that prices were depreciated, i. e., *lowered,* in this second inventory.

(k) Explanation of complainants' exhibit 19, report of Klink, Bean & Co.[201]

It is a smiling commentary upon the utter inconsistency of the opinion and decision in the court below that the learned judge of the trial court failed utterly to grasp the significance of this exhibit. Assignment of Error XVI (Tr. p. 175).

This exhibit (as testified to by Mr. Klink)[202] reproduced here comparing departments of merchandise in the first inventory with similar departments in this second inventory exposes the fact that after conducting a three weeks' sale *there were more articles of a similar kind at a given price in the second inventory* than in the first; *for the stock remained the same without the addition of new goods.*

(199) Tr. p. 48.
(200) Tr. pp. 56-78.
(201) Herein p. opposite.
(202) Tr. pp. 80-81.

A BRIDGE & COMPANY
SEATTLE

COMPARISON OF INVENTORY NO. 1 AND INVENTORY NO. 2 SHOWING THE CLASSES AND PRICES OF GOODS IN WHICH THE SECOND INVENTORY EXCEEDED THE FIRST

Class	Valuing Rate	Inv. #1	Inv. #2	Excess of Quantity	Excess Total
Men's Suits	6 50	4	9	5	
	6 75	-	1	1	
	9 50	191	195	4	
	10 50	38	96	58	
	13 50	41	85	44	
	14 50	21	46	25	
	15 50	-	1	1	
	16 50	1	15	14	
	17 00	4	6	2	
	20 00	4	5	1	155
Men's Pants	1 00	16	45	29	
	2 50	152	354	202	
	3 25	37	71	34	
	3 65	-	35	35	300
Shoes	75	-	2	2	
	2 25	19	34	15	
	2 50	21	87	66	
	2 60	15	28	13	
	3 40	21	34	13	
	4 10	2	5	3	
	5 00	20	43	23	
	5 25	-	3	3	
	5 55		4	4	142
Hats and Caps	175		90	90	
	50		48	48	
	75		34	34	
	1 00	2	3	1	
	1 05	8	39	31	
	1 25	42	65	23	
	1 40		22	22	
	1 85	25	36	11	
	3 50	3	15	12	
(Hats) Doz.	2 00		147	147	
" "	3 50		36	36	
" "	6 00		8	8	
" "	7 50		28	28	
" "	9 00		48	48	539
Overcoats and Cravenettes	4 75	3	15	12	
	5 25	-	2	2	
	5 75	-	17	17	
	6 50	26	44	18	
	9 00	40	41	1	
	9 50	2	21	19	
	10 00	3	4	1	
	10 50	8	23	15	
	13 00	5	7	2	
	15 75		2	2	89
Boys' Suits	None in Excess in Inv. #2				
Rubbers, Boots, Sandals, etc.	55	9	11	2	
	2 20	10	12	2	
	2 25	3	43	40	
	2 75		6	6	
	2 95		9	9	
	3 85		1	1	
	4 35		3	3	
	4 85		11	11	
	5 00		7	7	
	5 50		2	2	
	8 85		1	1	84

Class	Valuing Rate	Inv. #1	Inv. #2	Excess of Quantity	Excess Total
Mackinaws	3 25	2	21	19	
	4 10	16	20	4	23
Oil Coats	1 15	-	4	4	
	1 80	-	2	2	
	2 00	-	3	3	
	2 80	-	3	3	
	3 00	-	1	1	
	4 00	1	2	1	14
Sweaters	1 95		41	41	
	2 00	3	15	12	
	2 35	8	49	41	
	2 65	2	49	47	
	3 60	2	3	1	
	4 00	1	2	1	
	4 05	4	6	2	
	4 10	5	22	17	
	4 35	1	3	2	163

For instance: In the first inventory there were 152 pairs of pants costing $2.50 each. In the second inventory taken after a sale of three weeks, there were 354 pairs of pants costing $2.50 each; in other words, there were 202 more pants at $2.50 on hand after the sale than there were at its beginning. This, of course, shows prices were altered and must have been lowered, for an expert buying merchandise would *not raise* prices on *himself;* and, in addition, the *high priced pants* in the second inventory are mostly missing.

Another instance: In the first inventory there were two mackinaw coats costing $3.25. In the second inventory there were 21 mackinaw coats costing $3.25, or, in other words, *there were nineteen more* mackinaw coats at $3.25 on hand after a sale of three weeks than at its beginning.

The first inventory shows that $3.25 represented the *lowest price mackinaw coat* in the store; so that the price on the nineteen excess coats must have been *lowered* from the higher priced ones *(for there was nothing from which they could have been raised).*[203]

These excesses occur continually for the reproduced exhibit herewith alone *clearly shows about 2000 excesses, or alterations in prices.*

Mr. Klink testifies as follows:

> "I made a summary of these two inventories here, Inventory No. 1 and Inventory No. 2, Plaintiffs' Exhibits 'C' and 4. That is of the first and second inventories in detail showing the number of articles and cost price of each. This is the sum-

(203) Tr. p. 82.

mary showing the class and price of goods in which the second inventory exceeds the first."

Plaintiffs' Exhibit 19 offered and received in evidence.

"If a sale of this stock had been conducted between the dates of these two inventories, that is if the first inventory had been taken immediately before the sale and the second inventory immediately after the sale, then the difference between these two inventories gives the correct number of articles sold in these departments and the cost.

"I made an examination in detail of the departments comparing the total number of each article at a given price in the first inventory with those of a corresponding character and price in the second inventory; and the result is set forth in these summaries I have presented to the Court. In so doing I find in certain instances there were more articles of a similar kind at a given price in the second inventory than in the first. I find this condition in respect to every kind of article examined; for instance, suits, pants, overcoats, shoes, hats, sweaters. In fact I find these excesses throughout the entire comparison of the two inventories as far as I went.

"The inference of course is that there has been some modification and would call for an explanation by some competent person. I have no means of determining whether the prices in the 2d inventory were raised or lowered from the price in the 1st inventory. Possibly if the defendant's sales slips showed the cost prices they might be of assistance; that is if they showed the cost price of each article. Then if they did show the cost prices I would also have to know whether both their cost and selling prices were true and correct. If I had the correct cost price of every article sold on that sale I could account for these excesses.

"In the second inventory the excess artices in the suits over the first are 155.

"The excess of the pants over the first is 300.

"The summaries are in evidence.

"For instance take the article of mackinaw coats in the second inventory, Plffs. Ex. 4, with reference as to whether the prices in the second inventory have been raised or lowered from those in the first. The excess of these over the first inventory is 19. The lowest mackinaw coat price in the first inventory is $3.25. There were two of these at that price. There were twenty-one at $3.25 in the second inventory.

Mr. Olney. After a big sale of this Bridge merchandise lasting over weeks, Isaacs had more mackinaw coats at $3.25 at the end of the sale than he had at the beginning?

Mr. Schlessinger. I object to that.

The Court. The objection is sustained.

Mr. Olney. Were there any cheaper coats set forth in that first inventory from which he could have made that excess of 19 by raising prices?

Mr. Schlessinger. I object to that as not being expert testimony.

Mr. Olney. It is expert testimony.

A. *There were no cheaper ones.*

Q. Then prices on those coats *must have been lowered?*

Mr. Schlessinger. I object to that as being argumentative.

The Court. The objection is sustained."

There is one fact of which there can be *no doubt,* and which has in no wise been contradicted by the defendant, viz., that this second inventory taken by this trustee for the purpose of buying in the stock for himself and on which he placed his percentage bid *did not represent* Bridge cost prices, as he claimed, but was greatly depreciated, i. e., prices were lowered, as testified to by Mr. Seynei whereby it was possible to cheat these insurance companies out of thousands of dollars. And

that is why Isaacs took Seynei into partnership—*Seynei knew too much.*

Main *knew too little.* He knew nothing of this depreciation, as he swears he *understood the inventory to have been taken at Bridge cost prices and the same as the first inventory.*[204] Unless he knew of this material fact, no matter what his powers were, he could not bind the companies unless the fact of this depreciation and knowledge of it had been communicated to him.

This depreciation of that second inventory is indelibly there and wholly without a satisfactory explanation!

(l) There were still other methods of depreciation of the second inventory employed by the defendant.

By no means least of which in this connection are this trustee's famous sales slips offered the Court which show either they are some 1625 articles short *or else he depreciated this second inventory at least to that extent.*

In either case these complainants were directly defrauded by this defendant.

(m) His own sales slips prove this depreciation.

If Isaacs' sales slips are held to be correct, then the second inventory *must have been depreciated* to the extent of 1625 articles which are unaccounted for. This is corroborated by the evidence of Mr. Seynei that some of the best of the clothing, perhaps $5000 worth, was laid away in the balcony at the close of the retail sale where the public could not see it.[205]

(204) Tr. p. 122.
(205) Tr. p. 54.

In view of the actual conditions as already referred to and shown by the record, *Isaacs defrauded these insurance companies if he excluded any articles from this second inventory; for it all had a selling value and it was all turned over to him.* The universal evidence was that the damaged merchandise was reconditioned and sold; Mr. Meyer testifying that even the burned merchandise was marked and that the smoked shirts, collars and underwear were marked and sold *above* their original Bridge inventory cost.[206] Mr. Seynei[207] and Mr. Jeremy both testified the badly damaged did not exceed $500 and it was all marked. Mr. Jeremy testified the fire burned only the merchandise on one or two tables.[208] Even Isaacs testified that the burned merchandise only amounted to $300 or $400 and that he sold the damaged underwear at various prices.[209]

Mr. Mason, the adjuster for the assignee to whose interest it was to make the damage appear as large and as exaggerated as possible, can only find 216 articles a total loss and he said this merchandise of no value amounting to $300 to $700 *"was all on one or two tables" and was all entered in the first inventory*[210] which was a basis for estimating the loss. What could be entered in the first inventory could be entered in the second inventory.

(206) Tr. p. 90.
(207) Tr. p. 45.
(208) Tr. p. 75.
(209) Tr. p. 152.
(210) Tr. p. 117.

The first inventory stipulated by all parties to be correct shows the exact number of articles a total loss to be only 216.

The exact number of articles omitted from the second inventory as shown by a comparison of Isaacs' sales slips (if correct) and the differences between the first and second inventories, are shown to be 1625 articles, including 49 suits (which at $10 a suit would soon run into money), and 347 hats, et cetera (for detail, see herein pp. 116-117).

The evidence is overwhelming that the damaged merchandise practically all had some selling value and its being omitted from that second inventory (made by Isaacs for the purpose of his own percentage bid) was not on account of any damage to the merchandise but because Isaacs deliberately planned and schemed to cheat these companies and get possession of the stock for himself at a price way below its value for Mr. Seynei testifies "he depreciated it as much as possible so he would not have to account for it".[211]

Main was kept in complete ignorance of this depreciation, for he testifies he understood the second inventory to have been taken at Bridge cost prices the same as the first inventory, i. e., on the same basis as the first, that everything was included and that there was no depreciation allowed in the second inventory on account of damage.[212]

(211) Tr. p. 59.
(212) Tr. p. 122.

(n) The amount of Isaacs' depreciation of the second inventory.

And the amount of the depreciation is testified to by Klink, Bean & Co. accountants, through their senior partner, Mr. Klink, as follows:

> "The defendant represented to these complainants that he had in their fire sale sold Bridge stock for $17,800. If this were sold at a profit of 20% as has been testified to, the cost of the goods so sold was $14,800; and if we deduct this amount sold at cost prices from the first inventory of $45,954, it gives a balance remaining of $31,000. That is, *$31,000 would be the amount of merchandise on hand after the insurance sale, at cost prices.*
>
> "The second inventory, made by Isaacs, the defendant, only shows $24,600. The difference between the two is $6500.
>
> "That is to say Isaacs' inventory, the second inventory, is $6500 less than what the actual inventory would be if his purported insurance sale returns of $17,800 were 20% above the original inventory cost prices. On this basis this second inventory of the defendant *shows a depreciation of $6500.* If the insurance sale averaged more than 20% above cost this depreciation would be more."[213]

Thus fact upon fact, circumstance after circumstance, of all these frauds and their insignia cumulate one upon another and are largely uncontroverted by the defendant even in his own testimony.

(o) The trial Court fails to recollect this evidence.

I cite your Honors to our assignments of error VIII, XV, XVI, XVII, XVIII and XXXI to the effect that the District Court erred in refusing to consider the foregoing evidence of fraud and depreciation and in

(213) Tr. pp. 83-84.

neglecting to refer to or consider the summary in evidence in figures proving irrefutably the same, Complainants' Exhibit 19; as this one exhibit alone is sufficient to compel a decree to include the setting aside of the sale in bulk and charging this trustee in a sum at least equal to the total of the depreciated second inventory.

(3) His Concealment.

(a) Isaacs' statement to the complainants secretes the fact of his own purchase and commissions.

> "The general doctrine with respect to concealment as a form of actual fraud, and as distinguished from those analogous violations of fiduciary duty which do not constitute actual fraud, but may be included in the term 'constructive fraud', may be stated as follows: If either party to a transaction conceals some fact which is material, which is within his own knowledge, *and which it is his duty to disclose,* he is guilty of actual fraud."
>
> *Pomeroy's Equity Jurisprudence,* Sec. 901, Vol. 2, Third Edition.

This trustee's statement[214] of his handling of the trust set forth in the bill of complaint and forwarded the complainants by Isaacs keeps purposely from their sight and discovery the fact of the sale in bulk of their merchandise and that their trustee himself was the purchaser and had become its owner, *for it secretes the fact by making no mention of it.*

It was this trustee's duty to inform these complainants that their retail sale had been closed down, that

(214) Tr. p. 236.

their merchandise had been lumped off in bulk, and that he himself had become its owner, and of every material fact connected with the transaction; and it is a simple axiom that his failure so to do constituted active concealment. Assignments of Error, IV and VII (Tr. p. 171).

(b) This concealment would have proved successful to date if it had not been for the Seynei suit and Judge Van Fleet's opinion.

The record shows this concealment was successful and that if Isaacs had not denied his partnership with Mr. Seynei, or as Mr. Bailey expresses it in his evidence "tried to rob Seynei of the goods"[215] through compelling suit to be brought against him before Judge Van Fleet in the District Court, the *cestui que trust* would have had no knowledge of his duplicity in the transfer of the trust fund to himself without their knowledge; for the heads of the different complainant companies testify that they had no knowledge of it until after Judge Van Fleet's decision in the Seynei case and shortly before the beginning of this action.[216]

(4) Isaacs' Misappropriation of Commissions on His Own Clandestine Purchase.

(a) This trustee cannot claim any commissions on his own purchase and must return upon this accounting the $2218 withheld from the complainants.

This trustee wrongfully appropriated to his own use $2218 of the complainants' funds.

(215) Tr. p. 107.
(216) Tr. pp. 125-127.

This defendant on his final payment and statement to these companies secretly withheld $2218 from them as commissions for selling to himself without their knowledge their own merchandise.

This concealment by their trustee thus constituted a fraud upon his beneficiary.

The fact of such retention of monies is undisputed upon the record and the defendant upon the stand even boasted that he did not allow his partnership to have a dollar of it. Also that within a few hours he sold the same identical merchandise to his firm of H. C. Seynei & Co. for $11,094.[217] That profit belonged to the complainants and the Court erred in not so charging their trustee upon this accounting. Assignment of Error XI (Tr. p. 173).

Therefore this defendant upon the sale in bulk having withheld $2218 from the complainants for secretly selling to himself merchandise valued at cost price at $31,153 for $8875 net, must return the same upon this accounting.

In *McGar v. Adams,* 65 Ala. 106, Judge Brickell tersely puts the very proposition as follows:

> "An agent, who for a reward, is employed in the transaction of business, will justly forfeit all right to compensation if he is guilty of bad faith to the principal; and it would be singularly disloyal, if he is an agent to sell, for him to use the agency, and the trust and confidence reposed, to become, without the knowledge and consent of the principal, a purchaser, by a combination with others bidding for the property.

(217) Tr. pp. 153-4.

"If in ignorance of the facts the principal should make payment of the compensation, when informed of them, he may recover it back."

If it is shown that the broker is the purchaser through another for the property of his principal he cannot recover any commissions.

Ryan v. Kahler, (Tex. Civ. App.) 46 S. W. 71, 72.

"In Wadsworth v. Adams, 138 U. S. 380, it is stated in the syllabus, which is a summary of the doctrine as to the right of an agent to the compensation agreed to be paid him, as defined in the opinion of the Court by Mr. Justice Harlan—

"It is a condition precedent to the right of an agent to the compensation agreed to be paid him, that he shall faithfully perform the services he undertook to render; and if he abuses the confidence reposed in him, and withholds from his principals facts which ought, in good faith, to be communicated to the latter, he will lose his right to any compensation under the agreement; being no more entitled to it than a broker would be entitled to commissions who having undertaken to sell a particular property for the best price that could be fairly obtained for it, becomes, without the knowledge of the principal, the agent for another, to get it for him at the lowest possible price."

Hall v. Gambrill, 92 Fed. 38.

The failure of the trial court to hold the defendant to a return of these commissions upon this accounting constituted error under our Assignments IX, and X (Tr. p. 172).

(5) His Gross Inadequacy of Consideration.

In the words of the Chief Justice of California:

"We think there can be no doubt under the authorities that where, in addition to gross in-

adequacy of price, the purchaser has, in the language of the United States Supreme Court, 'been guilty of any unfairness or has taken any undue advantage' resulting in such gross inadequacy and consequent injury to the owner of the property, *he will be deemed guilty of fraud* warranting the interposition of a court of equity in favor of the owner who is himself without fault."

Odell v. Cox, 151 Cal., at 75.

(a) While trustee Isaacs transferred some two-thirds of the trust fund to himself for less than one-third of its value.

This trustee thus fraudulently gained possession individually of the trust fund in the manner previously described.

His purported bid was $11,094 including his commissions of 20% or $2218 on his own purchase, which deducted leaves $8875 cash payment to the complainants.

The second inventory taken by himself as a basis for his own percentage bid shows the merchandise as only of the value of $24,653, but which, in reality, as I have shown,[218] represented actually $31,153 of merchandise at Bridge cost prices, thus rendering the amount actually paid by him really nearer *one-fourth* of its wholesale value.

Isaacs' own handwriting and figures show the actual value of this merchandise in his own opinion to have been $24,603.39.[219]

His statement also to his partner Mr. Seynei at the time he thus wrote down the value of the stock as

(218) Herein pp. 179, 188.

(219) Herein p. 166.

$24,603.39 was that it *"was worth one hundred cents on the dollar"*.[220]

It was under his instructions that it was charged up against his partnership in the Seynei books as of the actual value of $24,653.[221]

And these books themselves made long before this cause came into being give mute evidence of its worth at that figure.

This sale in bulk was fraudulent as the Seynei books themselves establishing the prices he obtained for himself, show the price he claims to have paid to have been inadequate. Even Main on the stand admits that a better price might have been obtained. And Mr. Mason testifies:

> "If it appears that the broker in such manner buys in the stock of merchandise inventoried at some $24,000 cost price in bulk for himself at $9000, I would not consider that his employers, the owners of the stock, had been fairly treated or received a square deal.
>
> I presume in so buying the stock the broker would certainly expect to resell it at a profit. In such case where a broker purchases stock in bulk for himself and sells it at a profit for himself, the conditions being equal, he should have continued the sale at retail for the owners of the stock, and they should have had the profit."[222]

The price in bulk was inadequate, hence fraudulent, and these books together with the third inventory establish that fact.

(220) Tr. p. 63.
(221) Tr. pp. 61-62.
(222) Tr. p. 114.

(b) This trustee's personal profits further show the gross inadequacy of consideration for the sale to himself in bulk.

These Seynei books and their summary by Klink, Bean & Co. show his partnership profits on this Bridge stock alone at the Seynei sale were $1262.40 *above their original Bridge cost prices,* Isaacs' firm thus making a profit on them *of 10% above those Bridge cost prices.*[223]

(c) This trustee's total receipts for the entire Bridge stock sold in bulk to himself were $15,466 more than he paid these complainants for it.

If it be claimed the Seynei books show also new stock mingled with the old, our answer is that there was only $6000 of new stock all told, and we shall estimate to the Court with extreme accuracy what that new stock, exclusive of the Bridge stock, sold for.

Allowing a generous profit to Isaacs for this new stock we can accurately determine what the Bridge stock itself sold for.

The Seynei books [224] in evidence show the total receipts during that sale were	$16,067.94
The third inventory[225] taken at Bridge and original cost prices was held by Judge Van Fleet in Equity Cause 83, the Seynei case, to be the actual value of the tail end of this stock after the Seynei sale, viz.,	$16,633.57
	$32,701.51

(223) Tr. p. 83.
(224) Tr. p. 227.
(225) Tr. p. 220.

The total amount of new stock $6253.78 which was sold at a profit of ⅓ as was testified to,[226] amounted with that profit to	$8,350.30
And which deducted leaves	$24,351.21

as the amount realized by Isaacs for the Bridge stock alone, being $15,466 more than he paid for it.

In view of the above facts can it be truthfully said Isaacs' purchase price of $8875 was a just and fair consideration for this stock in bulk? Isaacs knew the true valuation of this stock better than anyone else: he was tempted and he fell; and the manner of his falling was even more sinister as I have already shown.

The Court is respectfully referred to our Assignments of Error XII, XIII (Tr. p. 173); XIV (Tr. p. 174); XV (Tr. p. 175).

Conclusion.

Isaacs' figures and totals false and untrue.

A review of the facts as disclosed in the foregoing pages and uncontroverted by this defendant, of direct misrepresentation of both the value and condition of the stock, of his fraudulent methods employed in obtaining the stock, of his forming a clandestine partnership to own the stock, his elimination of competitive bids, his lowering of his own bid, his depreciation of the second inventory, his concealment, his gross inadequacy of consideration as shown by his personal profits, all and each show that his clandestine sale in bulk to himself was a direct fraud upon these complainants and must be set aside.

(226) Tr. pp. 61-78.

There has been an utter failure of proof on the part of this trustee. He alone claims his gross receipts were only $17,800 at the complainants' retail sale. The explicit evidence of seven witnesses against him is to the effect that the merchandise was marked and sold at an average of 20% above its original Bridge cost in the first inventory.

That being so then the merchandise sold at that insurance retail sale cost only $14,800 (Bridge cost prices) (instead of $21,301 as claimed by Isaacs), which deducted from the first inventory of $45,954 leaves $31,153, the amount of merchandise which the second inventory should represent,[227] if not more.

This depreciated second inventory made by Isaacs only showed $24,653 merchandise on hand after the complainants' retail sale, which is $6500 less than it should be.[228]

This amount should be added to the amount of his depreciated second inventory, making $31,153; and following all precedents this trustee should be charged with the full value of this merchandise he sold so quietly to himself, together with his profits and interest, and together with the return to the complainants of the $2218 commissions on the sale in bulk withheld from them by this defendant as their trustee as commissions on his own clandestine purchase (Assignments of Error X, XI, XII, XIV, XV, Tr. pp. 173-5).

(227) Tr. p. 83.
(228) Tr. p. 84.

(B) THE LAW.

Under these circumstances shown in the foregoing facts, it was not even necessary for the complainants to show that their trustee committed *actual* fraud in acquiring their large stock of merchandise in order to set the transaction aside. The law is well settled that a trustee cannot purchase his beneficiary's property, without the latter's knowledge and consent. And it is not necessary, in order for the *cestui que trust* to set such a transaction aside, to show that actual fraud has been perpetrated in the consummation of the sale, or that he has been damnified in any way, or that the price paid was inadequate, or that the transaction was unfair in any particular; *though, in the cause at bar, the complainants have shown all these.*

V.

THE LAW GIVES THE BENEFICIARY THE ABSOLUTE RIGHT TO REPUDIATE SUCH A TRANSACTION AT HIS MERE OPTION WHEN APPRISED OF THE FACTS.

The American courts state the rule and its reasons very clearly in

Porter v. Woodruff, 36 N. J. Eq. 174, at 179,

in the following language:

> "The legal principle to be applied in deciding whether the defendant can successfully resist the complainants' claim is too firmly established to warrant even the most astute and courageous counsel in attempting to overthrow it, or to narrow its scope.

The general interests of justice and the safety of those who are compelled to repose confidence in others alike demands that the courts shall always inflexibly maintain that great and salutary rule which declares that an agent employed to sell cannot make himself the purchaser, nor, if employed to purchase can he himself be the seller. The moment he ceases to be the representative of his employer and places himself in a position toward his principal where his interests may come in conflict with those of his principal, no matter how fair his conduct may be in the particular transaction, that moment he ceases to be that which his service requires and his duty to his principal demands. He is no longer an agent but an umpire; he ceases to be the champion of one of the contestants in the game of bargain, and sets himself up to decide, between his principal and himself, what is just and fair. The reason of the rule is apparent; owing to the selfishness and greed of our nature, there must, in the great mass of transactions of mankind, be a strong and almost ineradicable antagonism between the interests of the seller and the buyer, and universal experience has shown that the average man will not, where his interests are brought into conflict with those of his employer, look upon his employer's interests as more important and entitled to more protection than his own.

In such cases the courts do not stop to enquire whether an agent has obtained an advantage or not, or whether his conduct has been fraudulent or not, when the fact is established that he has attempted to assume two distinct and opposite characters in the same transaction, in one of which he acted for himself and in the other pretended to act for another person, and to have secured for each the same measure of advantage that would have been obtained if each had been represented by a disinterested and loyal representative, they do not pause to speculate concerning the merits of the transaction, whether the agent has been able so far to curb his natural greed as to take no advantage,

but they at once pronounce the transaction void because it is against public policy.

The salutary object of the principle is not to compel restitution in case fraud has been committed or an unjust advantage has been gained, but to elevate the agent to a position where he cannot betray his principal. Under a less stringent rule, fraud might be committed or unfair advantage taken, and yet, owing to the imperfections of the best of human institutions, the injured party be unable either to discover it or prove it in such manner as to entitle him to redress. To guard against this uncertainty, all possible temptation is removed, and the prohibition against an agent acting in a dual character is broad enough to cover all transactions. * * * ''

In *Michoud v. Girod,* 45 U. S. 502, at 556, the Court said:

" * * * The enquiry in such case, is not whether there was or was not *fraud in fact.* The purchase is void, and will be set aside at the instance of the cestui que trust, and a resale ordered, on the ground of the temptation to abuse, and of the danger of imposition inaccessible to the eye of the court. * * * *Is it not better that the cause of the evil shall be prohibited, than that courts of equity shall be relied upon to apply the remedy in particular cases, by inquiring into all the circumstances of a case, whether there has or has not been fraud in fact?''*

In *Wormley v. Webb,* 44 Mo. 444, at 451, the Court said:

" * * * Nothing is better settled than that an agent or trustee, or person acting in a fiduciary capacity, cannot speculate for his private gain with the subject matter committed to his care, to the prejudice of his principal. He cannot be allowed to purchase an interest in property where he has a duty to perform which is inconsistent with the character of purchaser. The law does not presume

that such a transaction will always be impressed with fraud, but *it furnishes an inducement to fraud, and affords opportunities to persons, who should always act with the utmost conscientious and scrupulous good faith, to abuse their trust; and therefor a total disability is enjoined, to take away all temptation.* * * * ''

In *Mills v. Goodsell,* 5 Conn. 475, at 479, the Court said:

'' * * * It is idle to enquire into the fairness or unfairness of transactions of this character; whether the sale, under all the circumstances, was or was not the best that could have been made. * * * It is in vain to urge that he gave more than any one else would. * * * *The law cuts up, root and branch, the power to purchase, and the temptation to defraud. It will not permit an enquiry into the fairness or unfairness of the transaction.''

In *People v. Overyssel,* 11 Mich. 222, at 228, Judge Manning said:

'' * * * *If such contracts were to be held valid until shown to be fraudulent or corrupt, the result, as a general rule, would be that they must be enforced in spite of fraud or corruption. Hence the only safe rule in such cases is to treat the contract as void, without reference to the question of fraud in fact.''*

In *Bain v. Brown,* 56 N. Y. 285, at 288, Judge Rapallo incisively wrote:

'' * * * *When agents, and others acting in a fiduciary capacity, understand that these rules will be rigidly enforced, even without proof of actual fraud, the honest will keep clear of dealings falling within their prohibition, and those dishonestly inclined will conclude that it is useless to exercise their wits in contrivances to evade it.* * * ''

(a) Isaacs' technical sale to Seynei cannot aid him.

And the rule is the same where the agent purchases his principal's property jointly with another—the rule affects both the agent and his co-purchaser alike.

Thus in *Reeves v. Calloway,* 78 S. E. (Ga.) 717, at 720, the plaintiff had employed defendant, Etheridge, an attorney, to advise and represent him in the sale of his land. A sale was made to defendant Calloway. Afterwards, it developed that Etheridge was interested with Calloway in the purchase. The Court said:

> " * * * *The principle applies as well to a case where the agent joins with a stranger, who has knowledge of the agency, in making the purchase as where the agent is sole purchaser.* In such case the proportions of the purchase money paid by the purchasers is an irrelevant fact. It is immaterial whether the agent's partner in the transaction furnished all or a part of the money, if he knows of the agency and joins with the agent in the purchase of the property on joint account, or for their mutual benefit. The policy of the law forbids an agent employed to sell to place himself in an attitude of antagonism to the interest of his principal by associating himself with another in the purchase, and *a sale by an agent without the express consent of his principal to himself in association with another, with knowledge of his agency, will be set aside at the instance of the principal."*

To the same effect in

Reardon v. Washburn, 59 Ill. App. 162.

(b) Nor does Isaacs' purported "auction" aid him.

> "This rule of the civil law is practiced upon in our courts of equity and applied to trustees, agents, and generally to all persons who have been employed in a confidential character in relation to

property. *And it is immaterial whether the sale be made privately or at public auction, the reason of the rule is as strong in the one case as the other.''*

Saltmarsh v. Beene, 30 Am. Dec. 525, at 526.

And Mr. Justice Story, in the case of

Church v. Marine Ins. Co., 1 Mason 344,

thus clearly sums up and states the universal rule:

> ''Nothing can be better settled than that an agent or trustee cannot, directly or indirectly, become the purchaser of trust property which is confided to his care. The law will not suffer any man to earn a profit or expose him to the temptation of a dereliction of his duty, by allowing him to act at the same time in the double capacity of agent and purchaser, either at public or private sale. *This case, then, stands before the Court as if there was no sale; the ownership has never been legally divested.''*

(c) Isaacs' attempt to evade the rule.

This trustee, upon this accounting, practically admits substantially the facts to which we have referred in the foregoing pages, save the depreciation of the second inventory *(upon which subject he remains stone dumb),* but hides behind the technicality that he told George C. Main, an adjuster on the original loss, about the sale in bulk, and therefore is immune from attack, claiming Main to have been the agent of these complainants, and that alleged communication of the facts to him was so communicated to them.

This trustee says in brief: ''Ah, yes, that is the general rule, but I took the precaution to tell my friend Main all about everything, and his knowledge is the

company's knowledge—so—'*What are you going to do about it?*' "

The obligations of a trustee, however, who is acting for another whose relation is fiduciary, does not stop with asking the foregoing question. There are certain specific burdens which rest upon him. And when the matter comes to be submitted to the test of judicial scrutiny, the trustee cannot sit still in a court of equity and say, "Prove that I did not do my duty." He is required by the law to come forward and make an affirmative showing; and the transaction will be set aside unless he shall present clear and satisfactory proof that at least three essential elements were present:

(1st.) That the one to whom he claims to have imparted the information was in the employ as general agent of those he seeks to bind;

(2nd.) That the information he claims to have imparted contained every material fact known to the trustee which might affect the principals, and that, having such knowledge, the principals fully consented to the transaction;

(3rd.) To show affirmatively that the entire transaction was fair, free from fraud or misrepresentation; and that the trustee did everything which ought to have been done and did nothing which ought not to have been done, for the *cestui que trust.*

Yet he has not done so.

Mr. Main's deposition was taken by the complainants in Seattle in the month of July before the trial in San

Francisco the February following; and his refusal to come to San Francisco as a witness for the companies for rebuttal of Isaacs upon that trial is to be regretted. He has since died from the causes which were beginning prominently to manifest themselves at the time of the fire. And so, this defendant, upon the trial, could narrate *ad libitum ad nauseam* any concocted conversations with Main secure in the knowledge Mr. Main would not be present to refute it. Yet, with every circumstance arranged so eminently in his favor, Isaacs outside of his own self-serving declarations of these conversations, can point to not one single line of the record which shows or even remotely intimates that Main was the agent of or had specific authority at any time from these complainants at the time of the sale in bulk; or further, *had personal knowledge of Isaacs' frauds and misrepresentations.* In fact on his direct examination Main squarely testifies that at the time of the bulk sale he had *no* knowledge that Isaacs was a bidder and bought the stock:[229] and that he thinks he was out of town at the time of the sale: and that it was not until *after* the sale in bulk that he "understood" what was paid for it, and at which time, whether three months or longer after the sale there is nothing to show, he displays the greatest lack of accurate knowledge and authority and the most he can say is, "I understood." Main knew nothing about the stock or its condition at the time of the sale in bulk; swears he made no examination of the stock, and had nothing to do with the making of the second inventory:

(229) Tr. p. 121.

> "The inventory of $24,000 I did not make. Isaacs made it. I understood perfectly it was based on the Bridge inventory price. I did not make it so that I could not swear positively. But it was about forty-five per cent of that inventory, which I understood was the purchase price."[230]

Isaacs himself states he does not know whether Main was in Seattle at all for the two weeks preceding the sale in bulk.[231]

(d) Main a complaisant tool and ignorant of Isaacs' frauds.

At no time does Main give evidence of any actual personal knowledge of the real state of affairs, and of what actually did happen, but tries to help his friend by vague conversations, he does not know when or where.

(e) Not in the employ of complainants at time of sale in bulk.

If Main had been actually at the time of the sale in bulk an out and out representative of the companies he certainly would not have betrayed his trust to the extent that all this ignorance and indifference would indicate. Main felt no responsibility; his authority was clearly at an end. At no time is permission asked of or given by Main; for at all times we have Isaacs in the role of mentor, directing and disposing. Even if all Isaacs' narration of self-serving conversations with Main were Gospel, there is an utter absence of proof that at the time Main was acting as the agent of the complainants with authority from them or that the con-

(230) Tr. pp. 121-2.
(231) Tr. p. 158.

versations were heard by any ears save those of Main as a volunteer taking a friendly interest in Isaacs' doings, but whose authority had long since ceased and determined with his adjustment of the loss with the assured. As Mr. Bailey says:

> "When he (Isaacs) first came he indicated to me that he was such a high up representative of these complainants that he dealt only with the heads of these companies and the head representative at San Francisco; that he was above all the other adjusters and had nothing to do with them."[232]

Main gained his livelihood by working for many insurance companies as an independent adjuster and was paid by them for each individual job as he completed it. The sale in bulk was September 29, 1913. On September 8th, as appears by the record in this cause, he rendered to the complainants a bill for his services in connection with the Bridge loss and was paid off.

He writes therein as follows:

> "I have spent a good deal of time on this adjustment which accounts for the size of my bill, and believe it has been worth while. The stock has practically been in my charge for a number of days and all the details in connection with the care of same have been looked after by me *until the arrival of Mr. Isaacs on Friday last.*
>
> Receipted voucher in duplicate is enclosed covering my services and expense and trust all will be found satisfactory."[233]

(232) Tr. p. 104.

(233) Tr. p. 235.

Although his entire correspondence and records of all kinds are in evidence[234] they do not show he received further instructions or authority from these complainants, or that he was authorized to act further in the matter: nor was he paid for any further services in the premises.

> "There is abundant authority to the point that notice to an agent to be notice to his principal must be given to him while acting in the course of his employment."
>
> *Wittenbrock v. Parker,* 102 Cal. 102.

It is not sought here to charge these companies with any actual notice of Isaacs', their trustee's, wrongdoings, or of any knowledge of facts to put them on enquiry as to the fraud and deceit practiced by this trustee upon them. The defendant's contention in this respect turns upon the point of the constructive notice to the principal of the facts within the knowledge of Main, their alleged agent—upon the happening of the frauds and deceit in question.

A principal, will, of course, *in the absence of fraud,* be bound by the knowledge of his agent, and will, in law, be deemed to have constructive notice of such knowledge. *But,* in order to even thus bind the principal by knowledge possessed by the agent it is essential that the information

> "be obtained by, or imparted to, the agent while he is in fact acting as agent—while he is actually engaged in doing his principal's business, in pursuance of his authority, and in his character as agent."
>
> *Pomeroy's Eq. Jur.,* Sec. 670.

(234) Tr. pp.124-167.

Within these limits and to this extent there has been but little divergence of opinion on the part of the courts either in England or America, and the doctrine is elementary.

In the case at bar it does not appear that Main, who was not in the regular employ of the companies, but who acted for them merely upon the adjustment of this individual loss with the assured, acquired any knowledge in relation to Isaacs' acts (the misrepresentation of the value and condition of the stock, the fake auction, his dropping down his own bid from 47% to 45%, the secret sale to himself through a dummy, the secret partnership with Mr. Seynei, the false returns of the retail sale, the depreciation of the second inventory) during the time he was engaged for these companies. It nowhere appears, in fact, that he had any knowledge or notice whatever of them. Whatever notice *if any,* he had of Isaacs' frauds and wrongdoing, was obtained *after his authority from the companies had ceased,* and, as I have said, he had rendered his bill and been paid off *before* the fake auction, the lowering of the bid, the clandestine sale in bulk to the defendant, the secret partnership with Mr. Seynei, and the depreciation of the second inventory.

The differing authorities are all as to knowledge of the agent as to transactions *prior* to his employment, such as the Distilled Spirits case, 11 Wall. 356, but even as to this rule the Courts show a plain determination not to extend it, but to keep it confined within narrow and necessary limits.

There is, however, no citation or precedent anywhere that knowledge of the alleged agent *after* his authority has ceased and he has rendered his bill and been paid off can estop the principal from enforcing rights, as no knowledge has come to him.

(f) The complainants' position as to Main in this cause.

There was of course no question as to Main's authority as an adjuster in the adjustment of the loss with the assured; but he had no authority to bind the companies thereafter, the complainants' position being as follows:

1.

That Main was merely an independent adjuster not in the regular employ of the complainants; and had no authority from them after his settlement as adjuster of the loss with the assured.

2.

That no further authority beyond that settlement has been shown by the defendant, upon whom rests the burden of proof.

3.

That no such authority can be presumed.

4.

That starting for the sake of argument with the hypothesis that he had further authority explicitly from the companies after such adjustment, that knowledge of the falsity of Isaacs' figures and totals and his depreciation of the second inventory,

as exposed and proved by the complainants, for his purchase of their merchandise in bulk, has not been brought home to Main by the defendant upon whom rests the burden of affirmative proof.

VI.

MAIN'S AUTHORITY TO BIND THE COMPANIES CEASED WITH HIS ADJUSTMENT OF THE LOSS BY THE COMPANIES' PURCHASE OF THE MERCHANDISE FROM THE ASSURED AT $34,300.

The burden of proving *affirmatively* the agency and powers of ratification of Mr. Main rests squarely upon the shoulders of this defendant. Mr. Main was merely an adjuster, he says so himself, and the evidence nowhere shows he was anything else. That he was the companies' adjuster on this loss is freely admitted. His powers went no further, and if the defendant claims they did the burden was upon him to prove affirmatively his contention; and there has been an utter absence, an utter failure of proof.

> The burden of proof to establish ratification or acquiescence is upon the defendant.
>
> *1 Greenleaf on Ev.*, Sec. 74;
>
> *2 Pomeroy Eq. Jur.*, Secs. 816 et seq., Sec. 965.

Your Honors will, of course, take judicial notice of the statutes of the State of Washington in which State this loss occurred. Under those statutes an adjuster is defined as follows:

> "'Adjuster,' or 'Insurance Adjuster,' is a person, copartnership, or corporation, who undertakes to ascertain and report the actual loss or damage to the subject matter of the insurance due to the hazard or peril insured against."
>
> *Insurance Code, State of Washington,* Secs. 6059-62.

And in this regard your Honors' attention is respectfully called to Assignment of Error XXII (Tr. p. 182).

Such was Mr. Main, an ordinary insurance adjuster (and it nowhere appears otherwise) of limited authority to ascertain and adjust the loss with the assured. And in this connection and bearing directly in point, I urge your Honors' careful reading of the late case of

Manheim v. Standard Fire Ins. Co., 145 Pac. 992,

a Washington case decided by the Supreme Court on appeal, which exactly and clearly defines an adjuster and his duties and when his authority to bind the companies ceases, holding that where a statute defines the duties of an insurance adjuster no presumption of authority to perform other duties can arise from the mere fact that he acted as an adjuster; in which the Court says:

> "There is no showing that Mr. Jones occupied any position other than that of an adjuster, or that he was authorized to bind the respondent corporation by waiving any of its rights. All he was authorized to do was to investigate the fire, ascertain as nearly as possible the loss which appellant had sustained, and report his findings to respondent. An adjuster and his duties are defined by Section 2 of Chapter 49, Session Laws, 1911, at page 163, in the following language:

> "'Adjuster,' or 'Insurance Adjuster,' is a person, copartnership or corporation who undertakes to ascertain and report the actual loss or damage to the subject matter of the insurance due to the hazard or peril insured against.'
>
> No evidence was presented showing or tending to show that any additional authority was conferred on the adjuster by respondent, which would have the effect of empowering him to waive any of respondent's rights, or to admit or deny its liability. In the absence of some such showing, his only authority would be to investigate the fire, the amount of property destroyed, and the actual loss sustained, and report his findings to respondent, so that it might determine the question of liability.
>
> The statute having defined the duties of an adjuster, no presumption that he had authority to perform other duties, and thereby bind the respondent, can arise from the mere fact that he was acting as an adjuster."

The Court's attention upon this point is called to Assignment of Error XXIII (Tr. p. 183).

Mr. Main's own testimony shows he did nothing thereafter except to forward for Isaacs his final payment to the companies. His own testimony on this head is as follows:

He never saw or examined any books or records covering the sale by Isaacs and did not even ask to see them. He did not examine any books when Isaacs made his final payment to the complainants. He was not familiar with the time when the bids were asked for and never saw the advertisement. "The stock was wholly in Isaacs' hands. I had nothing to do with it. He could do as he pleased."[235] He only learned by hearing

(235) Tr. p. 121.

from Isaacs there were several bidders. He never saw any bids. He never examined the stock after the first inventory and never asked Isaacs for a statement in detail. He never received any reports from Isaacs, denying emphatically that the sales slips were ever sent to him as such or in any wise, but that Isaacs used his adding machine to foot them up for his own purposes (but which adding machine totals Isaacs refused to produce upon the trial); and that he, Main, did not know what Isaacs' daily sales were.[236] He never received any monies except to forward for Isaacs the final amount to the companies, purely a volunteer service.

His attitude and conduct was that of a disinterested person.

Main himself two days after Isaacs opened up the retail sale for these complainants showed that he considered that his authority was at an end by forwarding to the complainants a final report on the loss September 8, 1913, which is in evidence, and being paid off at that time. He demanded nothing further for any services. All of his correspondence with the complainants which is in evidence does not show that he ever received or demanded any payment for any service after the immediate settlement of the loss, showing he did not consider himself still in their employ, not even when he forwarded for Isaacs the defendant's final payment of $1094, for he made no deduction from it, and acted purely as a volunteer.

(236) Tr. pp. 122-3.

Main evidently considered his services at an end on September 8, 1913, for he assumed no further responsibility or interest in the matter and never communicated to the complainants any information as to the retail sale or as to the final disposition of the merchandise in bulk; and there is nothing to show he represented the companies, while on the other hand *Isaacs paid himself directly from the complainants' funds,* of which Main had no knowledge. The trial Court erred in holding otherwise. Assignments of Error XXX (Tr. p. 187), XXI (Tr. p. 181).

There is no evidence that the complainants knowingly permitted Main to exercise any authority after the stock passed into Isaacs' hands; nor had they any knowledge of any of Main's acts after that; nor is there any evidence to show that Main communicated with them concerning the disposal of the stock either at retail or in bulk after Isaacs took control.

Moreover, Mr. Goodwin and the four other Pacific Coast managers of the complainants, testified that "Main was only an independent adjuster, with only an occasional loss referred to him to adjust; that he was not one of the companies' men, nor a salaried employee."[237] So *prima facie* Main was *not* in the employ of the complainants after the adjustment of the loss with the assured, nor at the time of the sale in bulk.

On the other hand we have the clear cut agency of Isaacs as trustee direct with these complainants as his

(237) Tr. p. 125.

beneficiary as specifically alleged with Main eliminated, whose work and authority as an adjuster had ended. This defendant thus became trustee direct for these complainants, and, as alleged in the bill, and uncontradicted by the answer "did actually take over into his *exclusive* and *sole* possession and *contol* their said stock of merchandise and as their trustee proceeded to sell the same", this trust fund. Assignments of Error XXIV and XXV (Tr. p. 183).

There nowhere appears the slightest communication by Isaacs to the complainants of information of any kind to give them knowledge he was the purchaser of their merchandise at a sale in bulk or had charged them commissions of $2218 on his own purchase, or had realized for it $15,466 more than he had paid them for it, for in his final statement to the complainants he carefully omits all mention of it.

VII.

BUT EVEN ON THE HYPOTHESIS OF MAIN'S AGENCY THIS SALE IN BULK MUST UNQUESTIONABLY BE SET ASIDE UPON THIS ACCOUNTING UNLESS THIS DEFENDANT PROVES MAIN HAD KNOWLEDGE OF ALL THE FOLLOWING FACTS, AS JUDGE SCHOFIELD APTLY SAYS:

> "The doctrine is familiar, and has been often recognized by this Court, that an agent cannot, either directly or indirectly, have an interest in the sale of the property of his principal which is within the scope of his agency, without the consent of his principal, freely given, *after full knowledge of every matter known to the agent which might affect the principal.* It is of no consequence, in

such case, that no fraud was actually intended, or that no advantage was in fact derived from the transaction by the agent. The rule is not remedial of wrong actually committed,—it is intended to be preventive of wrong. Public policy requires, as was tersely and forcibly said by the Chief Justice in *Staats v. Bergen,* 17 N. J. Eq. 554, that 'a trustee may not put himself in a position in which, to be honest, must be a strain upon him.' An agent may undoubtedly buy of his principal, or have an interest in the sale of property belonging to his principal; but in such case the *burden is upon the agent* to show that the principal had knowledge, not only of the fact that the agent was buying or interested, *but also of every material fact known to the agent which might affect the principal, and that, having such knowledge, he freely consented to the transaction.''*

Tyler v. Sanborn, 128 Ill. 136, at 142; 15 Am. St. Rpts. 97.

Main certainly had no knowledge of the following facts and the defendant fails to show affirmatively that he had; and there is not one iota of evidence in the record to show that he had. Assignments of Error XXVI (Tr. p. 184), XXVII (Tr. p. 186), viz.:

1. At the time of the bulk sale Main did not know Isaacs was the purchaser, for he testifies: ''I was out of town at the time of the sale in bulk and had no knowledge Isaacs was a bidder and bought the stock; he told me so *afterwards.''*[238] There is not a line of evidence to show whether it was 3 months or a year afterwards that he learned Isaacs bought the stock, or whether before or after the commencement of the present action.

(238) Tr. pp. 120-1.

2. Even Isaacs himself admits it was *afterwards* he had his conversations with Main in this regard but only as to the *amount paid:* how long—whether three months or a year, he does not state and thus he evades the issue—but one thing is quite apparent and that is, that nowhere and at no time does he testify that he told Main before rendering his final statement to these complainants *that he himself was the purchaser.*

3. There is nothing in Isaacs final statement to the complainants to show that he was the purchaser of their merchandise. He says that before sending the statement he went over its items with Main,[239] *but he might have discussed the statement a million times with Main and yet Main from the face of the statement could never have discovered Isaacs' interest in the merchandise.*

4. Main flatly contradicts Isaacs for he testifies he did not and could not verify Isaacs' statement and figures as Isaacs was in San Francisco.[240]

5. But the *strongest evidence of all* that these facts were concealed from Main is the *admitted fact* that Isaacs *bought the stock in Seynei's name;*[241] *that he did not appear publicly as a bidder in his own behalf;*[242] that his partnership with Mr. Seynei was a secret and not a public one;[243] and that when he conducted the

(239) Tr. p. 153.
(240) Tr. p. 120.
(241) Tr. p. 55.
(242) Tr. p. 101.
(243) Tr. p. 61.

partnership sale he did not even conduct it in the partnership name of "H. C. Seynei & Co." but under Mr. Seynei's individual name—"Harry Seynei.[244] Mr. Seynei testifies that Isaacs compelled this secrecy and directly stated that he did this in this way *"as he didn't want Main and the insurance companies to know he was actually the owner of the stock."*[245]

There is nothing in Isaacs' evidence to show that he told Main at the time he was the purchaser; and there is nothing in his statement to the companies to show he was the purchaser.

Defendant's counsel filed 456 amendments to the statement of evidence, 10 pages of revised amendments and 35 additional amendments, yet he was utterly unable to find any proof that Main knew at the time Isaacs was the purchaser. On the other hand, we have the direct statement from Main that at the time of the sale he had *no knowledge* that Isaacs was the purchaser.

6. Main did not know the name of Seynei was used as a blind, for at no time does the evidence show that Isaacs told Main he would use Seynei's name. Nor does the evidence show that Main at any time had any knowledge of Isaacs' secret partnership with Seynei.

7. The very utmost that can be claimed for Main is Isaacs' own statement that during some vague conversation Isaacs thought it best to sell the goods off

(244) Tr. pp. 221-2-3-4.
(245) Tr. p. 54.

under sealed bids, and Isaacs "suggested" he might put in a bid himself, and the vagueness even of this the defendant's own story enforces scepticism.

8. Main did not know Isaacs had made arrangements with Mr. Seynei for the elimination of any bona fide competitive bids.

9. Main did not know the sale in bulk was a "fake".

10. Main did not know that some of the best merchandise in the store was taken by Isaacs and laid away in the balcony, some $5,000 worth, and was not open to public inspection for the bulk sale.

11. Main did not know the stock for the bulk sale under Isaacs' directions was so arranged as to make it look as cheap as possible and as discreditable as possible, as testified to by Mr. Seynei and Mr. Jeremy (Tr. pp. 57 and 78).

12. Main said regarding the sale in bulk *"I had nothing to do with it"*. What could be plainer? And further he testifies *"It was wholly in Isaacs' hands"*.[246] Not only did Main "have nothing to do with it" but the actual facts and happenings at that sale were concealed from him.

13. Main did not know there were no bona fide bids.

14. Main saw no bids. All he can say in this regard is, "I *have heard*" three men put in bids.

15. Main testifies he was out of town when the complainants' merchandise was advertised by Isaacs

(246) Tr. p. 121.

for sale in bulk. He did not know it was advertised only one day; that the bidders in San Francisco and Portland had not been notified; and that Isaacs made no proper effort to obtain competitive bids. Isaacs testifies he didn't know whether Main was in Seattle at all during the two weeks preceding the sale in bulk.[247]

16. Main did not even examine the stock at the time of the sale in bulk.

18. Main did not know that Isaacs lowered his own bid from 47% to 45%, thus reducing the amount of his bid $492 and thereby making a false total of $11,094 instead of $11,586.

19. Main did not know the bid of $11,094 was in reality only 35% of cost instead of 45% as represented by Isaacs.

20. Main did not know Isaacs misrepresented the *condition* of the stock when he stated it was all run down.

21. Main did not know Isaacs misrepresented the *value* of the stock when he stated there would be a loss in conducting the retail sale any longer.

22. Main did not know Isaacs misrepresented the *facts* when he told him the expenses were over $200 a day and the receipts were down to $400 a day "and running down and down".

23. Main did not know that the actual receipts for the last week of that sale averaged over $600 a day[248]

(247) Tr. p. 158.
(248) Tr. p. 246.

according to Isaacs's own depreciated figures in his purported "cash book" and that the expenses were less than $125 a day.

24. Main did not know (when Isaacs said he thought it best to sell the stock under sealed bids) *that Isaacs had already formed a secret partnership four days after the opening of the retail sale for the very purpose of buying that same stock* [249] *and had made arrangements for renewing the lease on the Bridge store.*

25. Main's permission was not asked or granted with regard to the sale in bulk by Isaacs to himself.

26. Main did not know how much stock was left as he says he did not examine it at all just before the sale in bulk.

27. Main did not know that Isaacs made the second inventory of $24,653 for the express purpose of a basis for his own percentage bid.[250]

28. Main did not know Isaacs misrepresented the true value of that stock in that second inventory.

29. Main did not know when Isaacs upon the sale in bulk claimed the highest bid was 45% of the original Bridge cost price that Isaacs had depreciated those cost prices thousands of dollars in that second inventory: *for Main repeatedly states he understood that second inventory was taken at Bridge cost prices the same as the first inventory and that there was no depreciation on account of any damage.*[251]

(249) Tr. p. 53.
(250) Tr. pp.53-58-59.
(251) Tr. p. 122.

30. Main did not know that in the taking of that second inventory as a basis for Isaacs' bid the *high priced goods were mixed with the low* and entered in that second inventory at prices far below the original Bridge cost prices on the sales tags.[252]

31. Main did not know Isaacs omitted some of the best merchandise from that second inventory and put it out of the way in the balcony.

The defendant has signally failed to show affirmatively that Main had knowledge of any of the foregoing.

(a) At no time and nowhere in the record has this trustee claimed Main had knowledge of his depreciation of the second inventory.

It would be a far cry indeed to imagine that either Main or the complainants knew of Isaacs' depreciation of the second inventory for his personal gain, and that instead of its representing $24,653 of Bridge merchandise at Bridge cost prices it in reality represented $31,153 of Bridge merchandise at the Bridge cost prices.

If Main, on the continuing hypothesis of his agency, had no knowledge of Isaacs' depreciation of the second inventory, the sale in bulk by this trustee to himself must be set aside upon this accounting, and the defendant charged with the actual inventoried value of the merchandise in his depreciated second inventory, viz., $31,153.

Is there not every indication that Main was intentionally deceived as to the true value of and condition and facts surrounding that stock of merchandise?

(252) Tr. pp. 56-7.

The five Pacific Coast managers of the complainants testify none of these facts were communicated to the companies;[253] and the rule is that

> *"Nothing will defeat the principal's right of recovery except his own confirmation after full knowledge of the facts."*
>
> *2 Pomeroy's Eq. Jur.*, Secs. 959, 964.

Isaacs' statement[254] to the companies enclosing the final balance of $1049 itself shows *prima facie* that the sale by Isaacs to himself was not communicated, for he makes no mention of it, and his non-mention of this most material fact constitutes active concealment.

On the hypothesis that Main was an agent of the complainants at the time of the sale in bulk, can it be said that he accepted Isaacs' final statement in evidence *"with full knowledge of all the facts"?*

Can ratification be impugned to an agent who is ignorant of the conditions?

Can one ratify something of which he knows nothing?

Yet now it is claimed without any proof on behalf of this defendant, that there was a ratification!

It is an affront to conscience to even suggest that such a story as is told by the foregoing facts is to be regarded by a court of equity as a ratification of any transaction conceded to have been tainted by such misconduct of a trustee.

(253) Tr. pp. 125-7.
(254) Tr. p. 236.

(b) No conflict in the authorities, yet trial Court held contrary to the established rule.

The rule is stated by Mr. Pomeroy (*2 Pomeroy's Eq. Jur.*, Sec. 959) as follows:

> "The mere fact even that a reasonable consideration is paid and that no undue advantage is taken is not of itself sufficient. Any unfairness, any underhanded dealing, *any use of knowledge uncommunicated to the principal,* any lack of the agent's good faith which Equity requires, renders the transaction voidable, so that it will be set aside at the option of the principal."

In *Mechem on Agency* (Sec. 466) the author says:

> "When the transaction is seasonably challenged a presumption of its invalidity arises *and the agent then assumes the burden of making it affirmatively appear that he dealt fairly, and in the strictest of faith imparted to his principal all the information concerning the property possessed by him.* The confidential relation and the transaction having been shown, the onus is upon the agent to show that the bargain was fair and equitable; that he gave all the advice within his knowledge pertaining to the subject of the sale and the value of the property; *and that there was no suppression or concealment which might have influenced the conduct of the principal.*"

There is no conflict in the authorities as to the equitable rule applicable here and it is indeed remarkable that the trial Court should have rendered a decision directly conflicting therewith. The matters referred to in its opinion fail entirely to meet any of the objections to the validity of the transaction of the sale in bulk particularly and of the specific evidence of *misrepresentation, actual fraud, concealment and misappropriation*

and in view of this uncontradicted evidence in this cause, the decree and decision heretofore rendered in the Court below should be reversed.

VIII.

ISAACS CANNOT CLAIM THE BENEFIT OF ANY CONTRACTUAL RELATION IN AGENCY AS HE WAS COMMITTING A TORT.

When Isaacs stepped out of his character as trustee and attempted by misrepresentation, actual fraud, concealment and misappropriation secretly to appropriate the balance of the trust fund for the very inadequate consideration of $8875 net, he stepped out of his contractual relation *(if any)* with Main, and thereafter proceeded *not* in contract *but* in tort. Assignment of Error XXIX (Tr. p. 186).

As was said in a somewhat similar case:

> "But the sale was not made under respondent's contract of agency, *but in their own wrong,* and whatever the rights of the parties might have been, had the sale been made in the character of agents under the original contract, I think they are chargeable for the full value."
>
> *Jeffries v. Wiester,* 13 Fed. Cas. No. 7254, p. 436.

When a trustee steps out of the scope of his trust and undertakes to transfer his beneficiary's property to himself, he acts beyond the authority of his trust, and his acts become invalid and cannot be sustained. Such transfer is simply void; no right of title passes;

the legal and equitable title remains as it was before the attempted transfer.

Pomeroy's Eq. Jur., Sec. 1088.

> *"The effect of even a partial misrepresentation is not to alter or modify the agreement pro tanto, but to destroy it entirely and to operate as a personal bar to the party who practiced it."*
>
> *Butler v. Prentiss,* 158 N. Y. 50.

IX.

MAIN BY SILENCE COULD NOT AUTHORIZE, RATIFY OR SANCTION AN ACT HE COULD NOT EXPRESSLY AUTHORIZE, SANCTION OR APPROVE.

HE COULD NOT PERMIT OR AUTHORIZE ISAACS TO DO WITH THE TRUST ESTATE THAT WHICH HE COULD NOT DO HIMSELF (Assignment of Error XXVIII, Tr. p. 186).

If the Court takes the remote view that the adjuster's authority did not end with the adjustment of the loss with the assured (though no further authority is disclosed by the record) I respectfully refer your Honors to the case of *Gilbert v. Hewetson,* 79 Am. St. Rep. 486, at 492, which is very akin on the question of Main's claimed ratification of Isaacs' acts under the hypothesis of Main acting as the agent of the complainants, to the effect that an agent cannot authorize, sanction, or ratify an act performed by another which he could not do himself. Judge Brown says:

> "He was himself an agent, a trustee of an express trust, and he could not permit or authorize his agent to do with the trust estate that which he himself could not do. He could not speculate in the trust property to his own advantage and benefit,

> nor could he authorize his agent to do so. *It would be a perversion of the law to hold that an agent could, by his silence, authorize, ratify, or sanction an act he could not expressly authorize, sanction or approve.''*

I also urge upon your Honors' attention the leading case in California on the proposition,

> *Burke v. Bours,* 92 Cal. 108 (approved 97 Cal. 374; 121 Cal. 287; 142 Cal. 641; 147 Cal. 449; 5 Cal. App. 232; 9 Cal. App. 232),

which is well digested in the headnote as follows:

> *''Where a subagent authorized to sell land reported to the agent who appointed him that he had received and accepted an offer for the property, and requested that if the sale was approved, the principal should sign an enclosed deed, which omitted the name of the proposed grantee, and, upon return of the blank deed with the principal's signature, inserted his own name therein, and sent his check payable to the order of the agent, who credited the principal therewith, and there is nothing to show that the principal knew of the check, or of the purchase by the subagent, no ratification of the transaction is shown, and the principal may treat it as void, and recover the property from the subagent.''*

And in *Butler v. Agnew,* 9 Cal. App. 328, it was held such a violation of the fiduciary relation was *''violative of law, contrary to public policy, and unlawful.''*

The complainants cannot be held liable for the misuse of a power which they never created.

Certainly, Main *even as agent* could not do the following:

(1) He could not have misrepresented the value of the stock.

(2) He could not have misrepresented the condition of the stock.

(3) He could not have eliminated competition.

(4) He could not have dropped his own bid from 47% to 45%.

(5) He could not have formed a secret partnership to get possession of the stock for himself.

(6) He could not have had a "fake" auction.

(7) He could not have transferred the stock clandestinely to himself.

(8) He could not have then *instanter* made a secret profit of $2000 by a transfer to his secret partnership.

(9) He could not then have conducted a sale of it for himself in the name of a third person to hide his interest and cover up his personal profits.

(10) He could not have turned the stock clandestinely over to himself for one-third of its value.

(11) He could not have withheld from these companies secret commissions on his own purchase.

(12) He could not have lowered and thus depreciated prices in the second inventory.

(13) He could not have mussed up the goods and made them look cheap for unlooked-for outside bidders.

(14) He could not have omitted merchandise from the second inventory.

(15) He could not have sent his principals a statement in which he concealed from them the fact of their

goods having been lumped off to himself at wholesale, and that he had charged them commissions on his own clandestine purchase and made no mention of all the preceding facts.

But Isaacs did all these!

It could thus be said of Main as was said in

Titus & Scudder v. Cairo & Fulton R. R. Co., 46 N. J. L. Repts., 393, at 418 and 420:

> "An agent whose powers and duties involve personal trust and confidence and the exercise of judgment and discretion, cannot, without authority from his principal, delegate to another the confidence and discretion reposed in him. Having by his own judgment and discretion determined what should be done, he may authorize another to perform the ministerial acts necessary to carry into effect the purposes of his employment, *but he cannot turn his principal's business over to the judgment and discretion of another, and bind the principal by the acts and conduct of the latter* * * *.
>
> "Nor can the plaintiff hold his contract as against the company on the ground of a subsequent ratification of the unauthorized act of the agent; for knowledge by the principal of the unauthorized act of the agent is essential to a ratification, and as soon as the company or its officers were made aware of Guthrie's act, they promptly repudiated it."

In order, of course, to be a "ratification" a full knowledge of all the facts and circumstances attending the transaction is essential.

> "A cardinal principle of the law of agency makes complete knowledge on the part of the principal of the unauthorized act of his agent essential to the ratification of an act of that nature. A special

agent is without power to appoint and confer upon a subagent powers in excess of his own, or to ratify an unauthorized act."

Fargo v. Cravens, 9 S. D. 651.

X.

HOWEVER, ISAACS—NOT MAIN—WAS THE AGENT OF THE COMPLAINANTS.

The allegations of the bill uncontroverted by the answer make this clear:

> "That the complainants accepted defendant's said offer and delivered over their said stock of merchandise into his hands to do his best for them on the terms and conditions aforesaid. That the defendant after thus contracting with the complainants did actually take over into his exclusive and sole possession *and control* their said stock of merchandise and as their said trustee and upon the terms and conditions mentioned above proceeded to sell the same in the said City of Seattle." (Tr. p. 4.)

And this allegation is confirmed by the answer, as follows:

> "Admits that defendant had in his exclusive possession *and control* said Bridge stock merchandise." (Tr. p. 16.)

The rule of presumption of notice to them therefore does not apply.

And in this respect probably the clearest statement of the principle is by Judge Sanborn in

> *Pine Mountain Iron & Coal Co. v. Bailey,* 94 Fed. 258, 261:
>
> "As long as the agent is conducting negotiations for his principal with third parties, he may act on

his own behalf; but the moment he undertakes, without the knowledge of his principal, to conduct them with himself, his agency ceases, and the powers and liabilities of that relation no longer exist. Voltz v. Blackmar, 64 N. Y. 440, 446.

"In consonance with this principle of the law of agency, the rule that notice to the agent is notice to the principal has an exception as well established as the rule itself. It is that when the agent acts for himself, in his own interest, and adversely to his principal, in a given negotiation or transaction, neither notice to nor the knowledge of the agent can be lawfully imputed to the principal. Surety Co. v. Pauly, 170 U. S. 133, 156; Frenkel v. Hudson, 82 Ala. 158; Waite v. City of Santa Cruz, 89 Fed. 619, 630; Barnes v. Gaslight Co., 27 N. J. Eq. 33, 37; Winchester v. Railroad Co., 4 Md. 231, 241; David Improved Wrought Iron Wagon Wheel Co. v. David Wrought Iron Wagon Co., 20 Fed. 699, 702; Thomson Houston Electric Co. v. Capital Electric Co., 56 Fed. 849, 853; Bank v. Cunningham, 24 Pick. 270, 276; Mechem, Ag., Sec. 723. The reason of the general rule is that it is the duty of the agent to communicate to his principal the facts relative to any transaction in which he acts on his behalf, and that the law presumes that he has discharged his duty. But when the nominal agent commences to act in his own interest, and adversely to his principal, the presumption no longer obtains that he will communicate to him facts which might prevent the consummation of the negotiation which he is conducting on his own behalf, and the counter presumption that he will conceal them arises. *As the reason for the rule no longer exists, the rule ceases to apply, and the exception prevails.*"

XI.

ON THE HYPOTHESIS OF MAIN'S AGENCY AND CONTINUING AUTHORITY EVERY PRESUMPTION IS AGAINST THE COMMUNICATION TO HIM BY ISAACS OF THE FACTS SURROUNDING THE BULK SALE BY ISAACS TO HIMSELF. THE PRESUMPTION IS IN FAVOR OF IGNORANCE RATHER THAN KNOWLEDGE BY MAIN. THE PRESUMPTION IS NOT THAT ISAACS COMMUNICATED THE FACTS TO MAIN, BUT THE PRESUMPTION IS TO THE CONTRARY.

The rule against the principal being charged with notice of facts known to his agent under the circumstances of the cause at bar, is stated as follows in *Clark & Skyles on Agency,* 2nd Ed., Sec. 485:

> "The doctrine that a principal is chargeable with notice of facts known to his agent is based not only on the fiction of identity, but also on the fact that it is the duty of the agent to communicate his knowledge to his principal, and the presumption that he has performed his duty.
>
> "No such presumption can arise, however, where the agent is dealing with the principal in his own interest or where he is acting in collusion to defraud his principal, or where, for any other reason, his interest is adverse to that of his principal, so that it is to his own interest not to communicate the knowledge to the principal. *In such a case the general rule that notice to an agent is notice to his principal does not apply.*"

Whittle v. Vanderbilt Co., 83 Fed. 48.

Louisville Trust Co. v. Louisville Co., 75 Fed. 433.

Lawson v. Beard, 94 Fed. 30;

Western Mortgage Co. v. Ganzer, 63 Fed. 647;

Hudson v. Randolph, 66 Fed. 216;

Bank v. Austin, 118 Fed. 798.

Mr. Mechem in his work on Agency in referring to the general rule, says:

> "The presumption, however, will not prevail where it is certainly to be expected that the agent will not perform this duty, as where the agent, though nominally acting as such, is in reality acting in his own or another's interest, and adversely to that of his principal." (Sec. 723.)

Judge Devens in the opinion in

Innerarity v. Merchants National Bank, 139 Mass. 332,

clearly states the exception as follows:

> "While the knowledge of an agent is ordinarily to be imputed to the principal it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the facts in controversy, *as where the communication of such facts would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating.*"

In speaking of the general rule in

Frankel v. Hudson, 82 Ala. 158,

Justice Somerville says:

> "It has no application, however, to a case where the agent acts for himself, in his own interest, and adversely to that of the principal. His adversary character and antagonistic interests take him out of the operation of the general rule, for two reasons:
>
> "First: that he will very likely, in such case, act for himself, rather than for his principal; and

"Secondly: he will not be likely to communicate to the principal a fact which he is interested in concealing.

"It would be both unjust and unwarrantable to impute notice by mere construction under such circumstances, and such is the established rule of law on this subject."

Said *Justice Maynard* in a New York case:

"It is an old dictum from which there has never been any departure, that an agent cannot bind his principal, even in matters touching his agency, where he is known to be acting for himself, or to have an adverse interest."

Manhattan Life Ins. Co. v. 42nd St. Ferry Co., 139 N. Y. 146.

XII.

RULE OF OMNIA PRAESUMUNTER CONTRA SPOLIATOREM.

Your Honors' continuing attention is respectfully urged to the fact that this defendant, a trustee, refused to give the complainants, his *cestui que trust,* an accounting, before this cause was begun, as Mr. Horne testified; and his evidence remains uncontradicted upon the record. Also that this trustee fought off by technical delays this accounting for a year; and that the present trumped up accounting furnished now is not a voluntary one, but a forced one, wrung from him by the Court. In such a case the rule is very plain as instanced in *Myers v. Myers,* 16 Am. Dec. 648-58, the Court holding that a trustee's refusing to account furnishes a good reason for adopting against him the most

rigid rule of calculation, in the following express language:

> "His refusing to account, however, furnishes a very good reason why the Court should adopt the most rigid rule of calculation which the law affords in behalf of the *cestui que trust* as a substitute for such omission."

It will be seen from the facts referred to as disclosed by the evidence, as your Honors have unquestionably concluded from your individual perusal of the record, that this trustee not only transferred the trust fund to himself for a gross inadequacy of consideration, but also committed toward these complainants as his *cestui que trust* various torts, such as *misrepresentation, misappropriation, concealment,* and *actual fraud.*

In such case the rule in equity is of course of the strictest interpretation and firmly interposes against him the equitable doctrine of *"omnia praesumunter contra spoliatorem"* for this rule in all its rigor is for wrongdoers, for those who have been guilty of a willful disregard of duty.

The Court will further have observed with interest Isaacs' careful destruction or non-production of the adding machine totals, the cash register totals, and the salesmen's indexes by which alone the equally carefully *preserved* famous ten thousand sales slips could have been checked up and their integrity determined. In this regard I refer your Honors with respectful insistence to the language of Justice Dodge and the case in which it was uttered;

Lessel v. Zillmer, 105 Wis. 334, at 339:

> "The principle is elementary that upon him who has the exclusive knowledge rests the burden of proof, and especially so in reference to goods held in a fiduciary capacity. The defendant not only failed to prove how or at what prices he had disposed of a considerable share of the property, but admitted that he had destroyed the record evidence thereof. Application of the rule *omnia praesumunter contra spoliatorem might well have held defendant to account for these goods at their inventory value.*
>
> "*Other facts, such as diversion of selected goods, of inventory value of $7200 into his own private business, where presumably they produced full trade prices, though he accounted for them at only $2400,* seem to confirm the conclusion that defendant will have realized a substantial profit to himself after carrying out his promise to the plaintiff."

I here lay special emphasis on those words—"*application of* the rule *omnia praesumunter contra spoliatorem* MIGHT WELL HAVE HELD DEFENDANT TO ACCOUNT FOR THESE GOODS AT THEIR INVENTORY VALUE" as exactly paralleling the contention of these complainants in the cause at bar.

> Assignments of Error, I, II, and VI (Tr. pp. 170-1).

This trustee's non-production of his wife—who was his "cashier", of the mysterious "Mr. Bass" who "kept" the purported "cash book"; his non-production of the cash register totals, the adding machine totals, and the salesmen's indexes, must be held against him as the presumption is that if produced they would have been unfavorable to him.

> "When one willfully suppresses testimony, the presumption is, that such testimony, if produced, would be adverse to him."
>
> *People v. Hurley,* 57 Cal. 146.

It was also the duty of this trustee to have kept accurate and intelligible proper books of accounts of all the transactions of this trust fund consisting of the merchandise of these complainants. The fact that he failed to do this furnishes a strong inference against him, and the maxim *"omnia praesumunter contra spoliatorem"* should therefore be applied against him by your Honors as Chancellors in this cause.

Dimond v. Henderson, 47 Wis. 172, 175-6.

The words of Judge Cole in deciding that case apply with particular significance to the cause at bar, as follows:

> "The books of the firm, which were introduced upon the trial, were kept in such a confused and unintelligible manner that it is impossible to get at the real state of the accounts. The business was intrusted entirely to the management *and control* of Henderson. He was paid a salary for keeping the books and transacting the business in a proper manner, and if he kept the books so imperfectly that the true state of the accounts and the transactions of the firm cannot be ascertained from them, it is but fair that every presumption to his disadvantage should be adopted. It is a case where the maxim, *omnia praesumunter contra spoliatorem,* should be applied, for it is wholly his fault that the means of ascertaining the truth are not furnished by the account books themselves."

The refusal of the trial court to so hold was clear error.

Assignments of Error XXXV and XXXVI (Tr. pp. 204-5).

XIII.

THE BURDEN OF PROOF—FIRST SUBDIVISION.

"The District Court Erred in Holding and Concluding That the Burden Was Not Upon the Defendant as the Trustee of the Complainants to Render Them a Proper Accounting."

Assignment of Error III (Tr. p. 170).

(A) The burden not only of proving affirmatively the agency and powers claimed by the defendant to have constituted the authority of Main, but of the absolute fairness and square dealing of himself as trustee in his every transaction relating to this trust fund, and that the transaction out of which his title at the sale in bulk arose was fair, open and well understood, rests squarely upon the shoulders of this defendant.

"In an action in equity against a fiduciary for an accounting based on improper dealings with property held in such capacity, the burden of disclosure rests on the fiduciary, and the plaintiff is relieved from the necessity of specifying and proving in detail the various breaches of trust."

Somervail v. McDermott, 116 Wis. 505.

"The *uberrima fides* of the fiduciary relation is the standard of fidelity exacted from a trustee. When such fiduciary relations exist, and a condition of superiority is held by one over the other, in every transaction between them by which the superior party obtains a possible benefit, *Equity raises a presumption against its validity, and casts upon*

that party the burden of proving affirmatively his compliance with equitable requisites, and of thereby overcoming the presumption.''

Pomeroy Eq. Jur. Sec. 956,

Butler v. Prentiss, 158 N. Y. 49.

''In the proceedings before the master the burden was upon the accountants to justify and vouch the accounts which they had rendered.''

Gutterson v. Lebanon Iron Co., 151 Fed. 72, 74.

''An agent who takes title from his principal of property of which he has charge from his principal *is bound to show affirmatively,* in order to maintain his title, if it is assailed, that the transaction out of which his title arose, was fair, open, and well understood.

''In such cases *fraud will be presumed,* and the agent, in order to keep what he has got, *must show affirmatively* that he has not abused the confidence which his principal reposed in him.''

Le Gendre v. Byrnes, 44 N. J. Eq. 372.

''When the agent empowered to sell himself purchases without full knowledge of all the facts by the principal, fraud in fact need not be alleged or shown to avoid the transaction. There is no rule more thoroughly settled than this one, and it requires only the fact of such a purchase to have been made to avoid the sale. No fraud in fact need be shown by the *cestui que trust,* and no excuse will be heard from the trustee to justify the act. The fact established and the result inevitably follows. Such purchase is *prima facie* voidable by the *cestui que trust* or principal, *and it rests with the trustee or agent seeking to sustain it to establish the facts which take it out of the general rule and make it valid.''*

Tilleny v. Wolberton, 46 Minn. 256-8.

Mr. Mechem, in his work on Agency, speaking of such a transaction, says that

> *"a Court of Equity, upon grounds of public policy, will subject it to the severest scrutiny. Its purpose will be to see that the agent, by reason of the confidence reposed in him by the principal, secures to himself no advantage from the contract. When the transaction is seasonably challenged a presumption of its invalidity arises and the agent then assumes the burden of making it affirmatively appear that he dealt fairly, and in the strictest of faith imparted to his principal all the information concerning the property possessed by him. The confidential relation and the transaction having been shown, the onus is upon the agent to show that the bargain was fair and equitable; that he gave all the advice within his knowledge pertaining to the subject of the sale and the value of the property; and that there was no suppression or concealment which might have influenced the conduct of the principal."*
>
> *Mechem on Agency,* Sec. 466.

In *Underhill on Trusts and Trustees* (Am. Ed.), at page 322, the author says that a transaction of this kind can be upheld only when the trustee "affirmatively and conclusively" shows *"That he and the beneficiaries were at arm's length and that no confidence was reposed in him."*

The *rule* with regard to purchases from a beneficiary by a trustee is there stated as follows:

> "A trustee may purchase, or lease, or accept a mortgage of trust property direct from the beneficiaries; but in that case, if the transaction be impeached, it is incumbent on the trustee to prove *affirmatively and conclusively:*

> "a. *That he and the beneficiaries were at arm's length, and that no confidence was reposed in him;*
> "b. *That the transaction was for the advantage of the beneficiaries; and*
> "c. *That full information was given to the beneficiaries of the value of the property, of the nature of their interest therein, and of the circumstances of the transaction.*"

In *Kerr on Fraud and Mistake,* Third (English) Ed., 135, the author says:

> "The burden of proof lies in all cases upon the party who fills the position of *active confidence* to show that the transaction has been fair."

Not only is the trustee bound by the duty so imposed to *communicate* to the *cestui que trust* the full effect, nature and consequences of his act before it is executed, but the law exacts also that the trustee shall see to it that the beneficiary *comprehends* the full force and affect of his acts. Nor do the obligations of a trustee who is acting for one whose relation is fiduciary stop there. As I have said, the trustee cannot sit still before the Chancellor and say, "Prove that I did not do my duty." He is required by the law to come forward and make an affirmative showing; and the transaction will be set aside unless he shall present clear and unmistakable proof.

(B) Defendant confesses he cannot meet this burden.

I propose now to point out that, instead of coming forward at once and courageously meeting the burden of proof, this trustee virtually confesses that he cannot meet it. This confession is to be found in the character of his efforts both with the facts and the law to convince

your Honors that the burden has passed from his shoulders. His theories and the arguments advanced in their support bear the desperate earmark of lost hope.

Here is what he does:

1. He makes the ridiculous claim in the face of the actual proof upon the record, that all his transactions with the trust fund have been fair and above-board; and that he fairly sold the best of the complainants' merchandise for them 20% *below* the Bridge cost prices in the first inventory, and the worst of it for himself 10% *above* the same Bridge cost prices in the first inventory.

2. He then while denying his own frauds and wrongdoing advances the impossible argument that his frauds and wrongdoing were known to George C. Main.

3. He then fathers the absurd claim that though on the day after the retail sale began, the same George C. Main, on September 8, 1913, sent the complainant companies his final report on the loss and bill for services, and was paid off, that nevertheless Main continued in the employment of these complainants.

4. He stands for the dishonest contention that his depreciation of the second inventory to the amount of $6500 or more must have been known to Main (though Main directly denies it) and that these complainants are therefore estopped in equity from discovery of his frauds or the amount of the embezzlement.

5. And he then tries to hide the whole issue when cornered by dodging behind those immemorial bulwarks

of dishonesty, Stated Account, Laches and the Statute of Limitations, which always have been "like the shadow of a great rock in a weary land" to the wrong-doer to shield him from the burning gaze of the Chancellor!

Isaacs, instead of acknowledging squarely from the first that the burden of proof is resting on his shoulders and meeting it, thus resorts to quibbles and ridiculous and flimsy pretexts so as to ward that burden away; and while doing all this claims the burden does not rest upon him at all to establish his own contentions.

I have pointed out activities and acts as well as omissions in the course of the transaction which does not leave the question open to doubt. It is the inexorable conclusion of the law that there was an abuse of the relation of trust and confidence on the part of this trustee. Under the facts shown by the record equity presumes the existence of fraud and casts the burden upon this trustee to prove affirmatively that the transaction by which he profited was all that it should have been. Above all things it is essential to the integrity of the transaction that it be absolutely free from the slightest suspicion of misconduct upon the part of this trustee. The very rule which so readily places the burden of proof upon him, is in itself a ringing declaration that no star chamber secrets shall attend such a transaction. The burden of proof upon this point rests squarely on Isaacs and he has not been able to escape it by any of his several significantly desperate efforts.

Equity is concerned with the question: *Have the obligations concerned with the burden of proof been met? Are Isaacs' explanations adequate to remove from the mind of the Chancellor the suspicion which the law put upon him?* And finally, Equity asks: *Has he shown that he has done all of the affirmative things which the rules of equity inexorably demand of a trustee?*

Instead of meeting this burden which the law thus cast upon him, what have we got? Is there any adequate answer to the array of facts and circumstances assembled by the complainants upon this record?

It is enough for us that the burden being upon him to prove by clear and satisfactory evidence his fair dealing with our property, this trustee has left his case with the burden not only unchanged but with the preponderance of evidence the other way.

XIV.

THE BURDEN OF PROOF—SECOND SUBDIVISION.

"(A) The district court erred in its decision in holding and concluding that the statement rendered by this trustee as set forth in the bill of complaint which was forwarded to the companies with his purported 'net balance' of $1049 became an account stated between the complainants and himself as their trustee.

"The District Court erred in its citation and rule of law on this point to the effect that the burden of proof rested on the complainants; the cases cited being where the fraud or error was apparent upon the face of the account.

"In the present cause Isaacs' statement to the complainants does not reveal his sale in bulk secretly to himself, nor his charge of commissions on such sale; and his fraud upon his fiduciary is not apparent from the closest scrutiny of the account."

Assignment of Error XLI (Tr. p. 209).

The lower Court, however, in its opinion lays down the following astounding rule in equity as to an account which does not disclose upon its face matters which are the subject of later enquiry and of which the most careful perusal gives no inkling of matters undisclosed and intentionally concealed in its totals:

> "The second proposition (burden on defendant) advanced by the plaintiffs is, of course, sound. But here an account was rendered, and acquiesced in for more than two years without question or protest. Under such circumstances the rule is changed and the burden is shifted to the party challenging the correctness of the account to show error or fraud, and this by clear and satisfactory proof.
>
> Eichel v. Sawyer, 44 Fed. 853;
> Porter v. Price, 80 Fed. 656;
> Charlotte Oil & Fertilizer Co. v. Hartog, 85 Fed. 150;
> Allen West Commission Co. v. Patello, 90 Fed. 629."
>
> (Tr. pp. 37, 38.)

Each of the foregoing citations was a suit *at law*, actions for commissions or on promissory notes, and their incongruity with reference to the facts of the present equity suit will easily be seen by taking each up *seriatim:*

In each the issue of "account stated" was raised by *creditor against* debtor.

Eichel v. Sawyer, 44 Fed. 845.

This was an action at law for conversion and damages for $220,000 by consignors against their factor, who answered, denying conversion, and setting up a counterclaim for commissions and various charges on the merchandise, in all an indebtedness to them of $186,541 as shown by accounts rendered repeatedly over a period of five years.

The Court naturally held the burden was upon the plaintiff to establish conversion and held where they had received statements at various times over the period and did not in a reasonable time thereafter point out errors or claim corrections, the law treated their silence as an admission of their correctness—with which abstract general rule I find no fault.

Potter v. Price, 80 Fed. 657.

This was an action at law upon three promissory notes given to a factor in payment of an account rendered by him for commissions on various sales. The opinion is based upon the following principle therein stated (p. 657):

> "But a man cannot be allowed to lay a rendered account aside, and afterwards, merely upon saying that he did so trusting to the honesty and accuracy of the other party, be allowed to attack it *in respect to matters apparent upon a reasonable examination* of the items *as stated on the face* of the account."

And the Court naturally held the account to be an account stated which could not be opened because an

item of interest which went into it was unknown to the party to be charged though clearly apparent upon the face of the account.

Charlotte Oil & Fertilizer Co. v. Hartog, 85 Fed. 150.

This was an action at law to recover $4269.66 for commissions on various merchandise. The Court says p. 154):

> "Fisher was examined as a witness upon the trial, and did not, in any way, contradict the testimony, or say anything which would controvert the inference fairly deducible from the correspondence and testimony *that he was fully informed as to everything connected with their transactions.* We must assume, therefore, that when the account was stated and submitted to him on June 10, 1893, *he had all the information necessary to an understanding of its correctness.*"

The Court then proceeds (p. 156):

> "This settlement is binding upon the parties as to all reciprocal demands then existing; certainly as to all known demands. What would be its effect as to *claims not then discovered* need not be considered, as none such appear. * * * *All the information relating to them was in the possession of the parties at the time the settlement was made.*"

Allen West Commission Co. v. Patello, 90 Fed. 628.

This was an action at law to recover $2732.50 for commissions on 2186 bales of cotton. The Court says (p. 630):

> "The letters offered in evidence show conclusively that the defendants were not, and could not have been, ignorant of the terms of the contract as to cotton not shipped, upon which the plaintiff was acting; and good faith required that they should properly notify the plaintiff of the fact if they did not consent to its terms."

The Court then proceeds (p. 632):

> "The recovery sought was for commissions on cotton not shipped; the accounts furnished to the defendants *so stated;* and in addition to the charges therefor, *set out in the accounts,* the plaintiff repeatedly advised the defendants by letter of the terms of the agreement, and that these items for commissions not shipped would be charged, to which no objection was made by the defendants for more than two years after the account was opened."

The Court naturally held the account to be a stated account "which could only be set aside by proof of fraud or mistake".

Now, the Cause at Bar.

The action at bar is very different. It is based upon matters of *equitable* cognizance. This is a suit in equity by the *cestui que trust* against their trustee for an accounting.

The issue of "account stated" is here raised by *debtor against* creditor.

The statement claimed to be a "stated account" is as follows:

"Statement	Salvage A. Bridge & Co.	
Clothing, furnishings, shoes, net sales		$28,901.92
Expense:		
Rent	$920.00	
Light	66.88	
Advertising	1,204.21	
Clerk hire	1,655.21	
Materials	90.84	
Insurance	34.59	
Commission for handling at 20% on $28,901.92	5,780.38	
Advanced as guarantee	18,100.00	27,852.11
	Net Proceeds	$1,049.81"

Can it be said the sale in bulk by this trustee and that he himself was the purchaser of their merchandise or that he had held out commissions on his own purchase, or that his depreciation of the second inventory or that the retail receipts were depreciated and sales slips missing, or that his receipts on his secret transfer to himself of their merchandise were $15,466 more than he paid them for it—*"are set out in the account"*; or that they are *"matters apparent upon a reasonable examination of the items as stated on the face of the account"*; or that when this statement was rendered them these complainants *"had all the information necessary to an understanding of its correctness"*, or that *"all the information relating to them was in the possession of the parties at the time the settlement was made?"*

Hardly!

I insist, too, that these propositions are so obvious, and that these authorities, taken from opposing counsel's brief in the trial Court, are so plainly not cited

with any regard to their applicability, that your Honors have further intrinsic evidence that this trustee is conscious of their weakness. It would hardly seem as though counsel and the trial Court had consciously read their own authorities.

(B) The Correct Rule.

Issue of "Account Stated" cannot be raised by debtor against his creditor.

The correct rule with reference to matters not apparent upon the face of the account, is laid down by Judge McPherson in a later volume, and is found in the words of the head note, as follows:

> "The rule that the failure to object to the correctness of an account rendered within a reasonable time renders it an account stated applies only to accounts *rendered by the creditor to his debtor, as to the correctness of which the latter has knowledge, and has no application to statements of account rendered by one who is bound by contract to account for sums collected in respect to which* he has knowledge, *but the creditor has not,* and the failure of the creditor to object because of omissions in the statement does not preclude him from recovering the items so omitted."
>
> *Vanuxen v. New York Life Ins. Co.,* 122 Fed. 106.

This decision has never been reversed and stands today the rule in all our Federal Courts, and is obviously the rule on this appeal.

Justice McPherson after referring to the general rule therein, says:

> "But is there any reason, either in law or justice, for the application of this rule to a case such as

that of the defendant which is practically that of an accounting trustee?

"The reason on which the rule rests is not present here, for the plaintiff had no means within his knowledge of verifying the account, and had only before him such items as the defendant chose to submit. His failure, therefore, to make any specific objection, is far more fairly referable to his want of knowledge than to any presumption of an agreement or an assent to the correctness of the account.

"But is there any such rule as is contended for by the defendant? Is there any rule which will permit a debtor to limit his liability by simply omitting to charge himself with certain items in an extended and complicated account rendered to his creditor, without means of knowledge? Surely a creditor cannot be held to such vigilance in asserting his right, especially when the debtor has the means of information exclusively in his own possession, and gives only those items on which he admits his liability; no reference being made to those which may be disputed. Does not the rule that a debtor must seek his creditor rather put the obligation on the defendant to duly notify plaintiff in the outset that such items are refused, and thus raise the question?

"The rule, rather, is that, when an account rendered is not objected to within a reasonable time, the failure to object will be regarded as an admission of its correctness by the party charged.

"But in this instance such a rule is invoked by the party charged—by the party indebted—as against the plaintiff seeking to recover for monies which the defendant has received, and for which it has failed to account."

The Court directed judgment to be entered for the plaintiff.

The Federal rule is evidently becoming the rule also of the States. In a very late case in the 1916 reports

Employers Liability Assurance Corporation Ltd. v. Kelly-Atkinson Corporation Co., 195 Ill. App. 620,

the wording of the able opinion by Judge Barnes would seem to have been with foreknowledge of the issues in the present cause. He says:

"Appellee finds analogy to an account stated in the claim that plaintiff acquiesced in the correctness of defendant's report because it made no objection thereto and rendered its bill thereon, but we think there can be no application of the rule of a stated account to this state of facts——

"There was no acquiescence by plaintiff in the correctness of defendant's report on which the bills were rendered. The debtor had exclusive knowledge of the facts on which the bills were rendered, and the creditor had no independent means of ascertaining their correctness nor grounds for objecting thereto.

"In *Vanuxem v. New York Life Ins. Co.,* 122 Fed. 107, it was held that the general rule as to the admission of items of an account from failure to object thereto was not applicable where the creditor had no means within his knowledge of verifying the amount and had only before him such items as the debtor chose to submit. Attention was also called in that case to the anomaly that exists here, *of the debtor instead of the creditor* invoking the rule, the court adopting the language of counsel to the effect that the admission of the correctness of an account rendered from failure to object thereto and the acquiescence in an account received from retention of it without objection *must be the admission or acquiescence of the party charged or indebted.*

"Reaching the conclusion that there was no stated account, we need not discuss appellant's contention for which there is ample authority, that *the doctrine of an account stated does not apply*

where the transaction involves fraud, concealment or misrepresentation.

"Appellee also urges that as plaintiff had the right to demand a view and examination of defendant's books and to compel an examination if refused, and has waited over five years before attempting to assert its rights, it was not only guilty of laches but had induced defendant to alter its position and was thereby estopped from claiming that the accounts made and accounts as settled were incorrect. The only change in defendant's position suggested is the destruction or loss of its books, which can hardly be ascribed to anything plaintiff did. However, when the case was here on appeal before, we said that *the evidence disclosed nothing until just before the suit that led appellant to question the accuracy of such report or to put it on enquiry, and that it would be a strange doctrine to hold that plaintiff was guilty of lack of diligence because it did not assume or suspect fraud where the nature of the business relation was such as to invite its confidence in defendant's report.*"

These decisions hold that the issue of "account stated" cannot be raised by debtor against creditor.

Isaacs, as trustee, when he rendered his statement, was the debtor of these companies, and unquestionably under the decisions therefore cannot raise the issue of "account stated" against them as his creditor.

Hence the trial Court in holding Isaacs' statement to have become an "account stated" and that the burden of proof therefore had shifted to the complainants, committed manifest error.

In

State v. Edwards, 94 Minn. 225, at 229,

the Supreme Court of Minnesota decided a similar case wherein the agent had rendered a like report to his principals of a sale of their merchandise which carefully concealed the fact of himself being the purchaser by making no mention of it. The Court said, speaking through Justice Lewis:

> "The record conclusively shows that on the following day the car of flax, without being unloaded, was disposed of by defendants at an advance of one-half cent a bushel. Under the law of agency such sale inured to the benefit of defendant's principal, and the attempted sale to themselves, as testified to by their agent, was, *prima facie,* a nullity. We cannot accept as applicable to this case the proposition that, if the shipper made no protest after receiving the report of the alleged sale and the proceeds thereof, he thereby accepted and ratified the sale. On the other hand, it was the duty of the defendant to clearly show that the shipper not only knew that the sale was made to themselves, *upon which point the report of sale is silent,* but that he also knew that subsequently the defendant sold the flax at an advanced price, and, being possessed of all these facts, he accepted the proceeds of the sale to defendant as final, and waived his right to profits on account of the subsequent sale. *In this respect the evidence entirely fails.*"

In this connection I respectfully also refer your Honors to Assignment of Error XLII (Tr. p. 209), as follows:

> "The District Court erred in its decision in holding and concluding that the complainants 'acquiesced for more than two years in their trustee's account without question or protest.'

"The evidence shows his fiduciaries had no knowledge of the frauds of their trustee nor anything to put them on enquiry until the revelations in the Seynei case against Isaacs in the Federal Court. Their action was then immediate."

XV.

"The District Court erred throughout the trial and in its decision in holding and concluding and refusing to consider evidence of actual fraud by the defendant and then in its opinion upon which the final decree dismissing the complaint was entered stating the complainants had not fully and clearly established such fraud."

Assignment of Error VIII (Tr. p. 172).

With respect also to the said paragraph of the Court's opinion covering stated account, I here call your Honors' attention to the words,

> *"and the burden is shifted to the party challenging the correctness of the account to show error or fraud, and this by clear and satisfactory proof"* (Tr. pp. 37, 38);

and then to the following proceedings upon the trial whereby the same Court REFUSED TO ALLOW *"the party challenging the correctness of the account to show error or fraud, and this by clear and satisfactory proof"*. The witness testifying is Mr. Jeremy on direct examination. I quote the record (Tr. p. 78):

> "I was present when the second inventory was made. It was made on a Sunday right after the first sale, the insurance sale, was closed the day before. The sale in bulk occurred upon the next day, Monday. In the making of this second inventory we made the stock look as cheap as possible for the bidders—the outside bidders; made it look as cheap

as we could. *This was by the defendant's direction.*

"Mr. SCHLESSINGER. I object to that, if your Honor please, on the ground it is not within the issues involved in this controversy. There is no claim here that the company was defrauded by reason of any act on the part of this defendant in the matter suggested by counsel's question.

"The COURT. *The objection to any testimony tending to show actual fraud will be sustained.*

"Mr. OLNEY. Exception."

If there was no other assignment in the case a prompt reversal should be had upon this alone.

XVI.

THIS TRUSTEE'S PLEA OF THE STATUTE OF LIMITATIONS.

"As the case before us is a suit in equity, and as the bill contains a distinct allegation that the defendant kept secret and concealed from the parties interested the fraud which is sought to be redressed, we might rest this case on what we have said is the undisputed doctrine of the courts of equity—

"They (statutes of limitation) were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred or extinguished, if they ever did exist. *To hold that by concealing a fraud, or by committing a fraud in a manner that concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to protect fraud the means by which it is made successful and secure.*"

Mr. Justice Miller, in deciding

Bailey v. Glover, 88 U. S. 342, at 348 and 349:

"The leading object of the statute (limitations) was certainly to prevent fraudulent and unjust claims from being brought forward after such a lapse of time that evidence might no longer be within reach of the other party by which they could be repelled. It was not intended to deprive a party of redress when by the act of the defendant himself he has been deprived of the opportunity of availing himself of it. To give it such a construction would make it a means of encouraging, rather than preventing, frauds. It is a general principle that no one will be permitted in a court of justice to claim protection by means alone of his own fraud. If the plaintiff has had knowledge of it, the statute of course, runs against him. *But if he has been kept in ignorance of his rights by the fraudulent contrivance of the defendant, does not the fraud of the latter estop him from claiming that there has been a delay in the prosecuting of the suit, which his own actions have prevented from being brought at an earlier day?*"

Munson v. Hallowell, 26 Tex. 475, at 484; 84 Am. Dec. 582.

"The equity jurisdiction of the courts of the United States is the same that the High Court of Chancery in England possesses, is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union."

Kirby v. Lake Shore Railroad, 120 U. S., at 138;

Bogert v. Southern Pacific Co., 244 Fed., at 66;

U. S. Rev. St., Sec. 721.

The defendant here pleads the statute only as to the sale in bulk (Tr. pp. 28 and 31).

Upon the trial in the lower court this trustee and his confreres appeared as total strangers to equity in that all their attenuated arguments and defenses were those commonly used by debtors in actions at law, totally ignoring the rule that in equity no length of time will run to protect or screen fraud. The learned counsel in the trial Court devoted his activities almost exclusively, as probably he will before your Honors, to the statute of limitations to save his client from the just decree of a court of equity; in urging the filing upon the trial of the amendment to the bill relating to the sale in bulk did not relate back to the time of the commencement of the action, and that whereas three years had elapsed from the time of that sale and the date of the trial that therefore the local Code of Civil Procedure of California relating to limitations, applied. But counsel unfortunately overlooks the fact that even upon the hypothesis of the applicability of the California codes the four year statute in vogue in California in actions for an accounting had not yet run, even at the trial date, against these complainants. Isaacs transferred the merchandise secretly to himself September 29, 1913; the present action in equity for an accounting was begun February 23, 1916, *nineteen* months before the statute of limitations, under the most favorable construction for the defendant, could be said to have expired. The date of the trial was January 31, 1917, which was still some eight months before the statute of limitation expired.

(a) In California the limitation in actions for an accounting is four years but does not run while the breach of trust is concealed from the principal by his agent.

Section 343, California Code of Civil Procedure, is as follows:

> "*Actions for relief not hereinbefore provided for.* An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

As this defendant takes refuge behind the California law, I beg leave to cite to your Honors a California case which completely disposes of his contention—a case where the principal sued for an accounting from his agent—where the court held that an averment and finding that a portion of the property was misappropriated by the defendant to his own uses did not change the cause of action; and I quote further from the head-note:

> "Statute of Limitations — Pleading — Express Trust—Concealed Breach.—The statute of limitation applicable to an accounting between an agent and the principal is Section 343 of the Code of Civil Pocedure, and cannot be invoked if not pleaded; nor could the statute begin to run, the relation being one of express trust, where no knowledge of a repudiation of the trust relation was brought home to the knowledge of the principal, but the breach of trust was concealed from him."

Allsopp v. Joshua Hendy Machine Works, 5 Cal. App. 229;

the above citing an earlier case by the Supreme Court of California in the following language:

> "In *San Pedro Lumber Co. v. Reynolds,* 121 Cal. 74, it is said:

> 'The statute of limitations cannot be successfully invoked. Reynolds was acting in a fiduciary capacity. Such of his acts as resulted in loss to the corporation were concealed breaches of trust. The statute of limitations would not begin to run in his favor, *so as to enable him to escape the results of an accounting,* until after knowledge by his principal of his derelictions. In this case the accounting was promptly demanded after discovery."

And likewise it may be said here that the complainants acted speedily and without unnecessary delay after discovery.

(b) Not applicable between trustee and cestui que trust until trustee assumes adverse position with notice to the cestui que trust: before that the statute does not even begin to run.

In *2 Perry on Trusts*, Sec. 863, the rule is stated as follows:

> "As between trustee and *cestui que trust,* in the case of an express trust, the statute of limitations has no application and no length of time is a bar. Against an express and continuing trust time does not run until repudiation or adverse possession by the trustee and knowledge thereof on the part of the *cestui* * * * The trustee must clearly repudiate the trust and assume an adverse position, with notice to the *cestui,* before the statute can begin to run."

But the principle is too well established to need further citation of authorities.

Yet our trustee advances this shamefaced plea that notwithstanding his direct frauds and shortcomings evidenced upon the record, and his undenied violation of

his position of trust and confidence, he is immune in equity because his confidential relation ended with the payment of his purported balance and statement to these complainants, and the statute of limitations has hastened to his aid! But how about this confidential relation? Did it indeed run down like a clock as soon as he had clandestinely transferred to himself the main portion of the trust fund? The learned trial Court says that it did and that *the statute of limitations had run on it by sundown on September 29, 1916, or thereabouts—seven months* AFTER *the present action was begun!*

The District Court must have held the *three year* local state statute of California applied, for it says:

> "It would seem idle, therefore, for the complainants to claim that they can now set this sale aside after the lapse of more than *three years*" (Tr. p. 41).

Thus the trial Court entirely overlooked the fact that this cause was filed only a little over *two* years from the date of the sale in bulk, and within *ten days* of the complainants' discovery of the misconduct of their trustee.

We cite this as clear error under our Assignment XLIII (Tr. p. 210).

(c) The complainants' amendment of their bill upon the trial did not change the cause of action.

Opposing counsel overlooked the fact that this is a Federal equity suit and that by new Equity Rule 20

> "the plaintiff may strengthen his case by a better statement of the nature of his claim,

> or a further and better statement of particulars of any matters stated in any pleading, upon such terms as the Court may order''.

That the amendment of the bill upon the trial by such permission of the Court related back to the time of the commencement of the action is too axiomatic to discuss before your Honors as Chancellors. Its few lines, filed at the suggestion of the Court, were not a supplemental bill nor an amended bill, but a simple amendment inserted in the body of the existing bill, as its own words directed—''after the words 'said sale' on line eight of page five thereof''. There is but one cause of action pleaded and that is to require D. Isaacs to account for the property of the complainants which came into his hands, from the beginning to the end; and that accounting opens up every angle of this trustee's acts to the broadest degree under the rulings of a court of equity as to what he shall be charged with upon the account, and if fraud, either through operation of law or principle of equity, appears, his acts are vitiated and he is charged accordingly.

That a complaint asks that a transaction be set aside does not make it demurrable for improper joinder of causes where such relief is necessary in order to entitle complainants to a recovery.

In

Smith v. Irwin, 108 App. Div. 218,

the complaint prayed for an accounting for assets obtained by false representations, and, further, that the transaction by which such assets were conveyed be set

aside. Justice Ingraham delivered the opinion of the Court, saying:

> "As I read this complaint, there is but one cause of action, and that is to require the surviving partner to account for the property of the firm which came into his hands; and the ground of demurrer that several causes of action are improperly united is, therefore, not well taken."

> "An amended complaint merely amplifying the allegations of the original and praying certain steps within the equity powers of the Court necessary to enable it to grant the same relief prayed for in the former pleading, is not objectionable as stating a different cause of action.
>
> "The inherent difference between law and equity cannot be ignored in allowing amendments to complaints. The prayer attached to a complaint is no part of a cause of action and cannot control a cause of action clearly alleged."
>
> *Northside Loan Soc. v. Nokelski,* 106 N. W. 1097.

> "The relief within the power of equity jurisdiction to afford is limited only by the wrongs to be redressed."
>
> *Harrigan v. Gilchrist,* 121 Wis. 127, 235;

and

> *"No time runs against the victim of a fraud while its perpetrator fraudulently and successfully conceals it."*
>
> *Kelly v. Boettcher,* 85 Fed. 56.

(d) Equity will not aid an agent who has assumed a position with reference to the business which is antagonistic to his principal.

A precisely similar situation and technical defense

of amendment upon the trial changing the cause of action arose in the case of

Moore v. Petty, 135 Fed. 668,

where the circumstance relating to amendment was very similar to the case at bar. There the petition as first filed proceeded upon the theory that the first sale by defendants was a sham, and was really to themselves, though made colorably to another for the purpose of deceiving the executors and defrauding the estate; that after accomplishing the deception they sold the land to other parties at a substantial advance; and that consequently the estate was damaged in that amount. After the issues were joined and the cause came on for trial, the executors, with the permission of the Court but against the objections of the defendants, amended their petition by alleging that the defendants, while acting as their agents, sold the land for the increased price, and received and still retained the same. The Court held the allowance of the amendment was within the discretion of the trial Court. The defendants did not suggest to the Court that they were taken by surprise, and request additional time to meet the interpolated amendment, but claimed, as here, it changed the proceeding. Judge Hook held it did not, and in the course of the opinion said:

> *"It will not do to draw lines too nicely to aid agents who have, during the existence of their relation of trust and confidence, assumed a position with reference to the business in their charge which is antagonistic to their principals."*

XVII.

LACHES. FIRST SUBDIVISION.

"The District Court erred in its decision in holding and concluding that the complainants acquiesced for more than two years in their trustee's account without question or protest. The evidence shows his fiduciaries had no knowledge of the frauds of their trustee nor anything to put them on enquiry until the revelations in the Seynei suit in the Federal Court. Their action was then immediate."

Assignment of Error XLII (Tr. p. 209).

"The District Court erred in its decision upon the wrong hypothesis of acquiescence in imputing laches to the complainants, and holding that laches short of the statute of limitations could be set up by an agent, the statute of limitations in actions for an accounting in California being four years, and the present action having been begun nineteen months before the statute expired."

Assignment of Error XLIII (Tr. pp. 209-10).

(a) The California rule.

Here again even the California cases balk the defendant. In *Cahill v. Superior Court,* 145 Cal. 47; it was held that before laches can be maintained as a defense there must appear in addition to mere lapse of time, some circumstances from which the defendant, or some other person, will be prejudiced.

And in *Cook v. Ceas,* 147 Cal. 614, 618, the Court said:

> "The effect of lapse of time upon a cause of action, where the delay is unproductive of and unaccompanied by any hardship or injustice to the other party, is determined by the provisions of the statute of limitations."

Time has wrought no obstacle or hardship upon this trustee. Isaacs does not come into Court empty-handed but claims to produce all the data made at the time of the sale—10,000 sales slips and his "cash book".

And in *Estudillo v. Security Loan Co.,* 149 Cal. 557, the same Court ruled that where the period prescribed by the statute of limitations has not expired, the right to maintain the action is governed not by the doctrine of laches but by the statute of limitations.

Though the local statute (if any) governing the cause at bar as pointed out in the *Allsopp v. Hendy Iron Works* case, is Section 343 of the California Code of Civil Procedure prescribing the four-year limitation, the present action as I have shown, was commenced within three years. There has been no laches; and in view of the confidential relation of the parties, the defense of laches cannot be interposed in this case.

Having at the time the greatest confidence in Isaacs the complainants were not bound to question his motives or investigate his acts. There were no circumstances attending the transaction calculated to arouse their suspicion or cause them to question the statement rendered them by the defendant as their trustee. There is no rule of law which under the cimcumstances here shown, required the complainants in dealing with the defendant to have acted upon the assumption that he was dishonest, and equity will not deny them redress because they failed to act upon such assumption. Such an attitude would be entirely inconsistent with the confidence they reposed in him. That confidence in the

nature of things precluded any suspicion or any questioning in their minds of his actions or statements.

(b) The Federal rule.

The cause at bar is by far a stronger one than

Kilbourn v. Sunderland, 130 U. S. 505, 518, 519,

where the complainants proceeded upon the liability of the defendants to account for the unauthorized appropriation of moneys received as complainants' agents, the amount of which they sought to reduce by excessive charges for the care and management of complainants' property; and also for certain differences between what was paid by complainants for property purchased through defendant at one price, though obtained by defendant at another. *The defense set up was that their claim was stale, that there had been a settlement by payment of a money balance, and that the three-year statute of limitations had run, and that the account had become a stated account through acquiescence and that they were estopped by receiving and receipting in full for the balance shown thereby $2715.58.*

Mr. Chief Justice Fuller delivered the opinion of the Court in which he said:

> "In answer to the defenses of laches and limitation the complainants contend that the alleged bad faith of defendants was not discovered by them until a short time before the bill was filed, and that they had no intelligible information of the excess in charges for care and management until late in June, 1878.
>
> "Reasonable diligence is of course essential to invoking the activity of the court, but what constitutes such diligence depends upon the facts of the

particular case. Where a party injured by fraud is in ignorance of its existence, the duty to commence proceedings arises only upon discovery, and mere submission to an injury after the act inflicting it is completed cannot generally, and in the absence of other circumstances, take away a right of action, unless such acquiescence continues for the period limited by the statute for the enforcement of such right. We hold that the complainants moved with sufficient promptness upon discovering the fraud, and that *although, reposing confidence in their agent, they may have neglected availing themselves of some source of knowledge they might have sought, the defendant cannot be allowed to say that complainants ought to have suspected them, and are chargeable with what they might have found out by enquiry aroused by such suspicion.*

"And we are satisfied from the evidence that this suit was commenced as against each and all the defendants within the statutory period, *after information of the charges for care and management reached the complainants, and that the accounts were so rendered that the rule of acquiescence ordinarily obtaining as between merchants is not applicable here.*"

It is the utter failure on the part of the trial Court to appreciate this relation of trust and confidence which is responsible for its holding in effect that "complainants should have acted with more promptness".

The complainants are not chargeable with laches, but on the contrary in view of the relations which existed between them and the defendant, they acted with the most exact promptness. They investigated promptly as soon as they suspected that they had not been fairly dealt with and appealed to a Court of Equity as soon as they were informed of the facts in the Seynei case

and of Judge Van Fleet's scathing arraignment of this same defendant at its close.

As was said by Judge Ward in a recent case,

Bogert v. Southern Pacific Co., 244 Fed. at 64:

> "So far as the defense of laches depends, not on the mere passage of time, but upon another familiar ground, viz., a change in the situation prejudicial to the defendant, there is no evidence whatever to sustain it. The exact nature of the case has been known to the defendant from the beginning. No equities have intervened."

XVIII.

LACHES. SECOND SUBDIVISION.

Nor are the complainants chargeable with constructive notice of any fact relating to the property.

In a relation of trust, the beneficiary is not chargeable with constructive notice of any fact, actual notice of which should have been given by the trustee.

To hold in this case that the complainants had constructive notice of any fact relating to their property would be contrary to the very spirit of equity. Yet this fundamental rule of equity was ignored by the trial Court.

In *Arkins v. Arkins*, 77 Pac. 256, 258, (Colo.) the Court said:

> "The defendant seeks to escape the principle above announced by invoking the aid of the well-settled principle that the presumption is that, if the party affected by any fraudulent transaction or management might with ordinary care and attention have seasonably detected it, he seasonably had

> actual notice of it, and cites Pipe v. Smith, 5 Colo. 146, 159, in support of her contention. The cases holding the above doctrine, including Pipe v. Smith, upon examination are found to be cases wherein the facts as disclosed by the record imposed upon the party some duty of investigation. In Pipe v. Smith the record discloses that the 'least ordinary diligence' would have disclosed and discovered the fraud complained of. *In the case under consideration, the relation of principal and agent, being admitted, warranted the plaintiff in placing implicit trust and confidence in the statements made to her by the defendant, and imposed upon her no duty of making enquiry to ascertain the truth or falsity thereof. The plaintiff had a perfect right to rely implicitly upon such statements.*"

In *Lazelere v. Starkweather,* 38 Mich. 96, at 107, which was *not* a case involving any confidential relation, the Court said:

> "There are cases which go very far in extending the doctrine of laches in applying the rule of constructive notice. We think, however, the better and certainly the safer rule to be that a mere want of caution is not sufficient,—*not that he had incautiously neglected to make enquiries, but that he had designedly abstained from making enquiry for the very purpose of avoiding knowledge. In other words, that he acted in bad faith.*"

Isaacs standing in the relation to them—*both in fact and under the pleadings*—as their trustee, the complainants under no circumstances could be charged with laches until after their knowledge of the evidence and Judge Van Fleet's opinion in the Seynei case, relating to a portion of this same trust fund, their property, a few days before the commencement of the cause at bar. Upon that knowledge, their demand for an accounting

upon the defendant, his curt refusal, and their appeal to equity for an accounting, occurred almost simultaneously.

There is no finding in the opinion of the trial Court of the ultimate fact that the action is barred by the laches, statute of limitation or unreasonable delay of the complainants. Instead of these the Court most indirectly and ambiguously infers certain probative facts which are totally unsupported by the record. There is no holding that the complainants *did know the facts of their trustee's various frauds and personal profits against their interest,* nor is there any holding that *any rights have arisen founded upon the complainants' alleged lack of promptness.*

XIX.

LACHES. THIRD SUBDIVISION.

The trustee cannot raise the issue against his beneficiary.

In *Ross v. Payson,* 160 Ill. 360, 43 N. E. 399, 402, which was an action to set aside a deed from a client to his attorney, it appearing that the defendant had been in possession of the property for seven years and that the deed was made fourteen years before the commencement of the action, the Court, in holding that plaintiff was not barred by laches, said:

> "That laches may be interposed as a defense in an action of this kind was expressly held in Elmore v. Johnson, supra, and in principle announced in many previous decisions of this Court. The rule laid down in Wood v. Downes, 18 Ves. 130, note 1, was approvingly referred to in the Elmore case, and it is to the effect that, '*length of time weighs less in such a case than in any other' and that it is*

extremely difficult for a confidential agent to set up an available defense grounded on the laches of his employer. We think there is great force, reason and equity in this statement of the law. It is further said in the Elmore case: Where bills are filed to set aside contracts or deeds between parties standing in a confidential relation with each other, the defense of laches is not usually regarded with favor.''

In *Hovey v. Bradbury,* 112 Cal. 620, the owner of stock in a corporation, upon departing from the state, transferred the stock in trust to an intimate friend, that he might represent it for him, and vote it at corporate elections, and there were express acknowledgments of the trust upon each failure to account for dividends upon the stock, with a promise to account therefor, and no repudiation of the trust was brought home to the knowledge of the beneficiary. In holding that the failure of the beneficiary of the trust to insist upon an accounting of the dividends for eight years did not constitute laches the Supreme Court of California through Mr. Justice Henshaw said:

> ''Nor, when we come to view plaintiff's conduct generally can there be seen any act or omission upon his part which would justify so stern a treatment of his claim as its rejection under the doctrine of laches. The doctrine, as has been said, is neither technical nor arbitrary. It is not designed to punish a plaintiff. *It can be invoked only where to allow the claim would be, because of the claimant's own acts, to permit an unwarranted injustice. It looks to the peace of society, and not to the punishment of the claimant, even if he has been negligent.* Whether or not the doctrine applies depends and must depend, therefore, upon the circumstances of each case. It is usually applied where a plaintiff

with knowledge that his rights have been invaded, or his trust repudiated, has submitted to unconscionable delay, during which other rights have arisen, founded somewhat upon his silence and acquiescence. *But it is never permitted to be invoked merely to aid a faithless trustee in consummating his wrong. Nor was it ever designed to be a check upon the right of a person to impose confidence and trust in another.*"

XX.

THE FINAL DECREE ENTERED IN THE TRIAL COURT SHOULD BE SET ASIDE AND ITS DECISION REVERSED (Assignment of Error XLIV).

In holding that a transaction such as the one here involved will be permitted to stand, even though there was an element of bad faith and both actual and constructive fraud appear upon the record, and in its refusal to consider or receive in evidence all testimony showing actual fraud, the decision and attitude of the District Court wholly disregards the well established equitable rule that proof of any suppression, concealment, unfairness or actual fraud gives the beneficiary the absolute right to set aside the transaction.

This is, I believe, the first decision ever rendered by a Federal Court which even intimates that the trustee's bad faith by which he personally profited in a transaction between himself and his beneficiaries, may be excused when impeached in equity.

In so holding, it is respectfully submitted, the District Court has wholly disregarded the established rule of equity that any suppression, any concealment, any unfairness, any actual fraud, gives the beneficiary the absolute right to set the transaction aside.

The record of this cause shows clearly that upon the trial the complainants proved conclusively that their trustee did not act in good faith, but that in fact he was guilty of many torts, suppression, concealment, unfairness and of *bald, actual fraud,* and had made large personal profits from his dishonest handling of the trust fund they had placed in his hands through the confidence they reposed in him.

And yet under these circumstances the trial Court decision has held that, although their trustee did not act in good faith in these particulars, such lack of good faith is not sufficient to put the stamp of fraud upon the transaction.

In a transaction of this kind an agent or trustee acts either in good faith, or in bad faith. There is no middle course. The beneficiary is entitled to the exercise of the *"highest good faith"* and the trustee is forbidden to exercise the *"slightest bad faith"*.

As said in *Mechem on Agency* (Sec. 1221, 2nd Ed.), a transaction of this kind will not be permitted to stand unless the agent shows *"that there was no suppression or concealment which might have influenced the conduct of the principal"*.

Professor Pomeroy *(2 Pomeroy's Eq. Juris.,* Sec. 959) states that in a transaction where an agent purchases from his principal:

> *"Any* unfairness, *any* underhanded dealing, *any* use of knowledge not communicated to the principal, *any* lack of the agent's good faith which equity requires, renders the transaction voidable, so that it *will be* set aside at the option of the principal."

The District Court erred in its decision in holding and concluding:

> *"The defendant commingled trust funds with his own, and failed to keep such accounts as should be demanded of every trustee, but this alone does not prove fraud or mistake"* (Tr. p. 42),

and its inference thereon that there was no other proof. Such however, are not *"alone"* upon the record, as the evidence shows this trustee on the very day he opened his retail sale for the complainants going to an out-of-the-way *private* banker and hiring a safe deposit box and visiting it an average of three times a week during the complainants' sale, although he had his own personal account in the Seattle National Bank and the use of a neighbor's (M. Aronson's) safe; his bringing his wife and daughter over *one thousand miles,* from San Francisco, *to handle the complainants' cash;* his fraud in lowering the bid for his sale in bulk to himself from 47% to 45%, thus directly cheating these companies out of $492 to his personal gain; his fake auction for the sale in bulk; his careful elimination of bidders and competition for it; his *fraudulent lowering of the cost prices in and depreciation of the second inventory* to the extent of $6500 or more for the purpose of his own percentage bid thereon; his laying some $5000 of the best of the stock away in the balcony before the sale in bulk so that the public could not see it; his afterward bringing it down and selling it for himself on the Seynei sale; his refusal to give his beneficiaries an accounting; his reliance on the technical defenses of stated account, laches and the statute of limitations in an equity suit for an accounting brought by his *cestui que trust;* his

offering in evidence only $2850 of outside checks from North Yakima as deposited in the Seattle National Bank when his own sister-in-law, who managed his North Yakima business, under subpoena testified the checks sent him from North Yakima during the period of his sale for the complainants at Seattle were some $7000; his concealment of his bank books and check books and stubs from the Court and his expert accountant, Herrick; his offering copies of deposit slips of the Seattle National Bank amounting to only $19,744.26 as deposited there while the bank's auditor testified in reality he deposited $20,577 during the insurance retail sale; his concealment of the cash register totals, the adding machine totals, and salesmen's indexes from the Court and his own witness Herrick, which were the sole proof of the accuracy and integrity of the selected sales slips offered in court in loose leaf, and which would show how many were missing; his depreciation of these sales slips; his shortages of articles unaccounted for; his sophisticated pencil cash book; his claiming he sold the best of the stock for the complainants fairly at a loss of 20% from their original cost prices while selling the worst of it for himself at a gain of 10% over the same cost prices; his padded clerk hire and expense account; his non-production of a single original receipt; his claiming that he sold merchandise at retail for the complainants for 20% below inventory when the evidence of his own salesmen was that on that sale it was marked and sold an average of 20% above the same inventory; his careful taking of receipts at his own Seynei sale from the clerks but not one single

receipt for clerk hire at his sale as trustee for the complainants; his secret partnership with Mr. Seynei; his clandestine purchase in bulk under Seynei's name; his conducting the Seynei sale under the name Harry Seynei; his declarations he didn't want the companies or Main to know he had any interest in the stock; his taking commissions on his own hidden purchase; his misrepresentations as to the value and amount and condition of the merchandise and of the progress of the retail sale; his short, one-day notice of the sale in bulk; his personal profits on his secret purchase in bulk as shown by the Seynei books and third inventory; his claim that the "fire burned through the premises" while disinterested witnesses testified it was confined to six feet of floor space and that the serious damage was only $500; the gross inadequacy of consideration for his purchase in bulk—all these, coupled with this trustee's "commingling of the trust fund with his own personal funds and his failure to keep such accounts as should be demanded of every trustee", the lower Court held *"did not constitute fraud"!*

In other words this surprising decision holds that these are not, and that no one of these circumstances is, of sufficient force to stamp the transaction as unfair, or unfairly entered into.

Clearly the District Court's decision is contrary to the well established rules of equity governing transactions of the kind here involved. These circumstances compel the inference that this trustee not only committed actual fraud but concealed facts which might have influenced the conduct of his beneficiaries; and the rule of equity

is that where there is the slightest fraud or concealment proved, the transaction must be set aside. These circumstances compel the inference that this trustee acted unfairly, and the rule of equity is that where any unfairness is shown the transaction must be set aside.

Where circumstances such as those here existing are shown by such undisputed evidence, the only inference that can be drawn is that the entire transaction was fraudulent and unfair. Any one of these circumstances being admitted to exist, the enquiry ends at once, and the beneficiary is entitled to a decree for the return of the full value of the trust fund, with interest, together with the trustee's profits thereon, less the amount he has already paid.

The decision of the District Court is erroneous in holding in effect that the Chancellor has discretion to refuse relief in a case where actual fraud, suppression, concealment and unfairness are thus shown by practically unconflicting evidence.

XXI.

IN CONCLUSION

THE COMPLAINANTS RESPECTFULLY REQUEST A JUST DECREE DE NOVO IN THIS COURT UPON THE RECORD.

I regret that I have been obliged unduly to extend this brief for the appellant companies, but I think that the questions involved excuse if they do not justify its length, and inasmuch as these questions are of general and vital importance to all fire insurance companies

who are or hereafter may be concerned in proceedings of like character, I hope that the Court may see that the public interests and the rights of litigants will justify and indeed do require a reversal and setting aside of the decree in the Court below and the rendition *de novo* of a just decree by this Court.

An appeal in a suit in equity invokes a trial *de novo* in the Appellate Court and entitles the appellant to a just decree.

> *Central Imp. Co. v. Cambria Steel Co.*, 201 Fed. 818.

This is especially so in a cause like the one at bar which comes up on a broad appeal.

> *Mt. Vernon Co. v. Wolf Co.*, 188 Fed, at 168.

This suit is in equity. In *Waterloo Mining Co. v. Doe,* 82 Fed. Rep., at 51, the Circuit Court of Appeals for this circuit has said:

> "It is further urged by appellees that this court is bound by the findings of facts of the circuit court unless they are found to be clearly and palpably erroneous. On appeal in an equity suit, the whole case is before the court, and it is bound to decide the same, so far as it is in a condition to be decided, on its merits."

And the Courts of Appeal in other circuits have declared that even in cases where the evidence is conflicting and the Chancellor has made a finding and decree thereon, the Appellate Court will not hesitate to disturb such findings if some serious mistake has been made in the consideration of the evidence, or if an obvious error has intervened in the application of the law.

With the utmost respect for the learned Judge of the trial Court, it must be insisted that it would be a judicial wrong to permit the opinion and decree thereon in this cause to stand.

The trial Court opinion holds in effect that it was proper for it to disregard completely evidences of bad faith if in the opinion of the Court they were not of sufficient force to put the stamp of fraud on the transaction. In this regard it is respectfully submitted the decision and decree are absolutely without precedent.

It is respectfully submitted that the trial Court decree holds that unconscionable conduct on the part of a confidential agent or trustee may be excused. Its effect is to substitute, in lieu of the requirement that the agent or trustee shall exercise the highest degree of good faith, a less exacting requirement. It directly sanctions the erroneous doctrine that there may be concealment or unfairness, and that nevertheless the Chancellor may refuse relief—that proof of concealment or unfairness or actual fraud does not necessarily entitle the principal or beneficiary to repudiate the transaction. It substitutes for the established equitable rule that any concealment or unfairness absolutely entitles the cetui que trust to a recovery of the value of the trust fund together with their trustee's profits thereon, the erroneous doctrine that a transaction between a principal and confidential agent or trustee and beneficiary, may be permitted to stand although tainted with concealment, actual fraud and unfairness. It is most respectfully submitted, that in a case where it is established by the evidence that there was actual fraud, concealment and unfairness, the Chancellor

is bound to grant the relief prayed for. In such a case there is no room for the exercise of discretion.

I believe that if the Court upon the trial had allowed the evidence to have been written up before making its decision, the taking of this appeal by the complainants would have been unnecessary. Many of the matters covered by its opinion rest upon asserted details of testimony which evidently the Court's recollection did not extend to. The parties were some days in court, and to remember the details of the evidence without having the assistance of a transcript was manifestly impossible, and the consequent errors of the decision could so probably not have been avoided.

The complainants therefore pray that the said decree dismissing their bill be reversed, and that the Honorable, the United States District Court for the Southern Division of the Northern District of California, Second Division, be directed to enter such decree as is meet in the premises; or that this Honorable Court shall reverse said decree and render a proper decree on the record, and a judgment for their costs and disbursements herein together with their costs and disbursements in said trial Court, and a reasonable sum for their counsel fees covering this litigation.

Dated, San Francisco,
February 19, 1918.

Respectfully submitted,

JESSE OLNEY,
Solicitor and Counsel for Appellants.

(APPENDIX FOLLOWS.)

APPENDIX.

KLINK, BEAN & COMPANY

Offices
San Francisco
Los Angeles
Oakland

Accountants.
Business Counselors
Devisers of Business Systems.

Correspondents
New York
Chicago
Seattle

KOHL BUILDING,

San Francisco, September 25, 1917.

Mr. Jesse Olney,
Humboldt Bank Building,
San Francisco, California.

Dear Sir:

Re American Central Insurance Co. vs. D. Isaacs:

Pursuant to your request, we have made a tabulation of the sales slips examined by us in the above suit with the following result:

	Suits	Overcoats	Pants
September 6	65	42	103
7			
8	34	21	45
9	19	2	34
10	23	2	44
11	14	4	39
12	18	3	26
13	43	22	81
14			
15	11	2	43
16	7	1	35
17	3	1	15
18	4	2	13
19	7	1	18
20	23	7	89
21			
22	12	8	22
23	7	1	27
24	5	3	17
25	5	2	25
26	6	1	20
27	13	4	53
Sundry Dates Slips	100	17	52
	419	146	801

Yours truly,
KLINK, BEAN & COMPANY,
By H. J. Cooper.